No. 78-19

In the Supreme Court of the United States

OCTOBER TERM, 1977

FRUEHAUF CORPORATION, WILLIAM E. GRACE and ROBERT ROWAN,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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To: The Honorable, the Chief Justice of the United States and Associate Justices of the Supreme Court of the United States.

Petitioners, Fruehauf Corporation, William E. Grace, and Robert Rowan, pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Sixth Circuit, entered May 5, 1978, affirming a judgment of conviction against them entered by the United States District Court for the Eastern District of Michigan, Southern Division.

OPINIONS BELOW

The Opinion of the United States Court of Appeals entered May 5, 1978, has not been reported officially; it is reported unofficially in 41 A.F.T.R.2d, ¶78-614, and it is reprinted in full at pp. 1-73 of the Appendix to this Petition.

The Memorandum and Order of the United States District Court for the Eastern District of Michigan, dated February 19, 1975, denying petitioners' motion to dismiss the indictment on the ground that the applicable period of limitations had expired, is reprinted at pp. 74-77 of the Appendix. The District Court's Memorandum and Order denying petitioners' motion for new trial is reprinted at pp. 78-104 of the Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered May 5, 1978 (App. 105), and petitioners' timely Petition for Rehearing was denied June 6, 1978 (App. 106). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether petitioners have been denied their constitutional right to indictment by the grand jury upon conviction of a conspiracy essentially different from that charged in the indictment?

2. Whether a conspiracy to defraud the United States with respect to revenue, in violation of 18 U.S.C. §371, is governed by the statute of limitations for internal revenue offenses (26 U.S.C. §6531) or by the general criminal statute of limitations (18 U.S.C. §3282)?

3. Whether the conspiracy of which petitioners were convicted, which had three distinct objects, was governed by one statute of limitations?

   a. If the conspiracy was governed by one statute of limitations, whether that statute was required to be the statute providing the shortest period of limitation?

   b. If the conspiracy was governed by more than one statute of limitations, whether the court was required to withdraw from consideration any time-barred objects of the conspiracy?

4. Whether petitioners were entitled to offset overpayments of excise tax against proved deficiencies as a defense to a charge of conspiracy, where the overt acts alleged consisted solely of filing excise tax returns understating the tax liability?

5. Whether an indictment for conspiracy to commit offenses against the United States in violation of 18 U.S.C. §371 must allege the essential elements of the object offenses, including willfullness?

STATUTES INVOLVED

See Appendix, pp. 107 *et seq.*

STATEMENT OF THE CASE

Petitioners were convicted in the district court, sitting without a jury, of a single-count conspiracy, described in detail immediately below. The district court entered findings of fact and conclusions of law, and the court of appeals affirmed.

A. The Indictment

Defendants were indicted on November 9, 1970 in a one count indictment for violation of Title 18, United States Code, Section 371, which charged in pertinent part that they:

> ". . . wilfully and unlawfully conspired with each other, and with other persons unknown to the Grand Jury, to:
>
> (1) defraud the United States by impeding, impairing, obstructing and defeating the lawful governmental functions of the Internal Revenue Service (IRS) of the Treasury Department of the United States in the ascertainment, computation, assessment, and collection of $12,344,587.31 in Federal Manufacturer's Excise Taxes;
>
> (2) attempt to evade and defeat (contrary to Section 7201, Title 26, United States Code), the payment of $12,344,587.31 in Federal Excise Taxes to be due and owing and due and owing to the United States by the FRUEHAUF CORPORATION for the period October 1, 1956, through December 31, 1965;
>
> (3) aid or assist in, and procure, counsel and advise the preparation and presentation (in violation of Section 7206(2), Title 26, United States Code), of materially false and fraudulent Excise Tax Returns (IRS Form 720) for the defendant FRUEHAUF CORPORATION for all calendar quarter years beginning October 1, 1956, and ending December 31, 1965, the returns understating the amount of Excise Tax payable by FRUEHAUF CORPORATION totaling $12,344,587.31.
>
> • • •
>
> (10) that defendant ROWAN and co-conspirator Morris sought approval of independent attorneys and accountants to lower the wholesale price tax base by representing to them that the defendant FRUEHAUF CORPORATION performed 'extra services' for wholesalers which it did not perform for other FRUEHAUF customers, and that the charges for these 'extra services' were included in the invoiced prices to the wholesalers, thus allegedly overstating the wholesale tax price base; whereas it was well known that FRUEHAUF never had nor did it intend to furnish any of these 'extra services' to the wholesalers.
>
> THE GRAND JURY CHARGES that, in addition, it was part of the conspiracy:
>
> (11) that the invoiced price to the wholesalers would be reduced by an arbitrary percentage to establish a false lower Excise Tax base, and that a substantial amount would then be recouped in the form of supplemental billings for these non-existent services.
>
> (12) that elaborate accounting and invoicing procedures were set up by ROWAN, Chawner and Morris for the benefit of defendant FRUEHAUF CORPORATION wherein the charges for these false services were concealed in such a manner as to escape detection upon an Internal Revenue Service audit. . . (Jt. App. 23-29).[1]

The following representations were made by government counsel prior to trial:

> Mr. Muller: • • • Now, in this case, your Honor, we have essentially three charges that Fruehauf initiated in 1956 and carried through the end of the conspiracy or through the end of 1965, and that is, number one, they initiated a charge for interest. A second charge was for advertising which name they subsequently changed to "printed matter", and the third was "management consulting".
>
> Now, the Government will establish that in instituting these three charges, the Defendant Fruehauf Corporation through its officers made false representations to its attorneys as to the nature of the services.

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[1] "Jt. App." refers to the Joint Appendix filed by petitioners in the court of appeals.

We will show this Court that in fact these were never rendered, that by their own admissions, for example, the printed matter—

The Court: (Interposing) What do you mean, "were never rendered"?

Mr. Muller: Never rendered, no services were rendered. They are false and fictitious, your Honor.

* * * [S]o I think the issue presented before this Court will be were these charges bona fide or were they fraudulent. That's what it amounts to, and the Government is here to prove that they were not, that they were fraudulent, that they were instituted, that it is a part of impeding and impairing. They were items for which nothing existed, and manipulative bookkeeping procedures will demonstrate, just the whole totality of the case will demonstrate that, so in effect, we have here, I think, there will be no question in the evidence, that the alleged co-conspirators were acting in concert with tax motivated purposes, and that the charges that they made were false or fictitious, or that they are not established by any evidence or records, and then the question then presented to the Court will be whether other offsetting deductions which evidently defense feels that they can establish should be considered. (Jt. App. 261-263.)

B. The Trial

The courts of appeals recognized that during the course of trial, at least four witnesses called by the government testified, on cross-examination, that Fruehauf Corporation had in fact rendered services to its wholesale distributors. (App. 52.) None of these wholesale distributors were called as witnesses by the government although they were under subpoena and had been interviewed prior to trial "concerning the nature and quantity of any service received from Fruehauf Corporation. . . ." (Jt. App. 125-126.) The government called Revenue Agent Kiefer to make tax computations for the last quarter of 1964 and the four quarters

of 1965. He made tax computations pursuant to a hypothetical question based on an assumption that the amounts charged to distributors were a part of the price of the trailers sold to them. (Jt. App. 1406-1408.) He considered the supplemental charges to be part of the selling price and computed a tax deficiency based on this assumption. (Jt. App. 1408 & 1487.) He testified that under this hypothetical it made no difference whether the charges were for services actually rendered to the distributors. (Jt. App. 1488, 1530.) Mr. Kiefer testified (Jt. App. 1363-1364) that in making his computations he relied upon the "condition of sale" provisions of Treasury Decision 6340 (Gov't. Exhibit 89), which was the official promulgation of Regulations 330 under the 1939 Internal Revenue Code on December 16, 1958. It provided:

> "Any charge which is required by a manufacturer . . . to be paid as a condition of sale of a taxable article . . . is includible in the sale price upon which the tax is based." (App. 17.)

The trial court recognized that the government's tax computations were not based upon the "supplemental billings" being for non-existent services. (Jt. App. 1548.)

C. Findings of Fact and Opinion of the Trial Court

Defendants rested at the close of the government's case and filed a Request to Find the Facts Specially pursuant to Rule 23(c) F.R.Cr.P. One of these requests was:

> "22. Were independent wholesale distributors to whom Fruehauf sold trailers, invoiced by Fruehauf for services never received by such distributors?" (Jt. App. 155.)

The trial court did not answer this question in his findings of fact. In his Memorandum and Order Denying Motion

for New Trial he stated his reason for not responding to defendants' requests:

> "... [I] is difficult for the Court to ascertain how findings can be made in a criminal case in behalf of a defendant who has presented no defense by way of evidence countervailing that of the government." (App. 94.)

The court adopted proposed findings of fact submitted by the government. (App. 94-95.) In his finding of fact No. 142 (Jt. App. 205) he found that Fruehauf Corporation's excise tax returns for the fourth quarter of 1964 and all four quarters of 1965 had been substantially understated in furtherance of the alleged conspiracy. In support of this finding he cited the tax computations that had been made by Revenue Agent Kiefer pursuant to the hypothetical question, *supra*. (Jt. App. 205; Gov't. Exhibits 242B, 243A & 243B.)

In his Memorandum and Order Denying Motion for New Trial the trial judge stated the basis for conviction:

> ". . . the defendants and the co-conspirators had by a concert of action, and wilfully, devised a plan to illegally avoid the payment of excise taxes in the manufacture of trailers by surreptitiously employing a device described as supplemental billings, *which contained charges that should have been included in the tax base,* . . . ." (App. 97; Emphasis Added.)

D. Opinion on Appeal

The court of appeals recognized that the trial court had based its finding on the "condition of sale" theory advanced by the government at trial:

> "The district judge found that, as had been charged in the indictment, appellants had employed deceptive invoicing procedures to conceal the supplemental billings, but in apparent contrast to the indictment, found that appellants had billed distributors under the supplemental charge plan for amounts that should have been included in the wholesale price and hence in the excise tax base. Appellants point out that the conspiracy found by the district judge, unlike that alleged in the indictment, did not involve fictitious charges for services that were never rendered." (App. 34-35.)

It held that there was neither a formal nor a constructive amendment of the indictment but rather a variance. (App. 36.) It then held that this variance was not prejudicial and, therefore, not a "fatal variance", because defendants were informed by the bill of particulars "that they would be facing a number of prosecution theories, including the condition of sale theory". A portion of the bill of particulars stated:

> "(10)(c) The Government will contend that if any services were rendered, the charges therefore were not properly excludable from the excise tax base." (App. 43.)

REASONS FOR GRANTING THE WRIT

I.

DEFENDANTS WERE CONVICTED OF AN OFFENSE NEVER CONSIDERED BY THE GRAND JURY

The essence of the conspiracy described in the indictment is a blatantly fraudulent scheme of excluding from Fruehauf's excise tax base supplemental charges for services which were never rendered. The conspiracy proved at trial involves the exclusion of supplemental charges for services which, whether rendered or not, were not legally excludable. The lower courts' adoption of this theory had the effect of excusing the government from proving that the services had not been rendered, as required by the language of the indictment. We submit that it was also approval of a variance between the indictment and proof, which deprived defendants of their constitutional right to be tried and convicted only on an indictment presented to and returned by a grand jury.

The court of appeals acknowledged that there was a variance between the allegations of the indictment and the theory of defendants' convictions (condition of sale):

> "The district judge . . . in apparent contrast to the indictment, found that appellants had billed distributors under the supplemental charge plan for amounts that should have been included in the wholesale price and hence in the excise tax base. Appellants point out that the conspiracy found by the district judge, unlike that alleged in the indictment, did not involve fictitious charges for services that were never rendered." (App. 34-35.)

Whether this difference constituted a constructive amendment to the indictment and, therefore, a "fatal variance" was a question strenuously argued in the court of appeals, but the opinion of that court is principally devoted to discussing the various legal theories sustaining the trial court's opinion that these supplemental charges were legally required to be included in Fruehauf's excise tax base. With respect to whether such a theory of proof was within the theory of the indictment, the court disregarded the allegation in paragraph (11) that the "supplemental billings" were "for these non-existent services."[2] The court interpreted that paragraph as alleging a manipulation of the wholesale price which could be accomplished by unlawfully excluding charges for services which were legally required to be included. Read in conjunction with paragraphs (10) and (12), paragraph (11) unmistakably alleges that the lowering of the wholesale price was to be accomplished through charges for "non-existent services". This had been government counsel's consistent interpretation prior to trial, as exemplified by his statement: "Never rendered, no services were rendered. They are false and fictitious, your Honor" (Jt. App. 261).

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[2] This is clear from the following portion of the opinion:

> The gist of Subpart (11) of the indictment is the allegation that appellants conspired to manipulate the wholesale price of trailers in order to establish a reduced excise tax base and to recapture the amounts otherwise lost by the lower price through the supplemental billings.
>
> THE GRAND JURY CHARGES that, in addition, it was part of the conspiracy:
>
> (11) *that the invoiced price to the wholesalers would be reduced by an arbitrary percentage to establish a false lower Excise Tax base, and that a substantial amount would be recouped in the form of supplemental billings* for those non-existent services. (Emphasis supplied.) (App. 42.)

The court of appeals did not determine whether the indictment included the "condition of sale" theory. Instead it held that any variance between the indictment and the proof at trial would constitute harmless error if not prejudicial to defendants, citing *Berger* v. *United States,* 295 U.S. 78 (1935). It concluded that there had been no prejudice because the government had made this statement in its bill of particulars:

> (10)(c) The Government will contend that if any services were rendered, the charges therefore (sic) were not properly excludable from the excise tax base. (Jt. App. 50.)

Thus the government was allowed to amend the indictment through a bill of particulars. Such practice was disapproved by this Court in *Russell* v. *United States,* 369 U.S. 749, 769-770 (1962):

> It is argued that any deficiency in the indictment in these cases could have been cured by bills of particulars. But it is a settled rule that a bill of particulars cannot save an invalid indictment.

The bill of particulars is not a part of the indictment and can neither add to nor subtract from the crime charged. *United States* v. *Critchley,* 353 F.2d 358, 362 (3rd Cir., 1965); *Krause* v. *United States,* 267 Fed. 183 (8th Cir., 1920); *United States* v. *North American Van Lines,* 202 F. Supp. 639 (D.C.D.C. 1962).

The court's reliance upon this part of the bill of particulars was misplaced for the further reason that it was an exposition of paragraph (10) of the indictment, which related to alleged misrepresentations by defendants to counsel concerning the alleged "extra services", not of paragraph (11), which alleged false charges for non-existent services.[3]

Under controlling decisions of this Court, conviction of defendants under the "condition of sale" theory constituted a constructive amendment to the charges of the indictment returned by the grand jury. In *United States* v. *Stirone,* 361 U.S. 212, 217 (1960), the Court held:

> The Bain Case, which has never been disapproved, stands for the rule that a court cannot permit a defendant to be tried on charges that are not made in the indictment against him.

Again, in *Russell* v. *United States,* 369 U.S. 749, 770-771 (1962), this Court held that if a defendant could be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him it would deprive the defendant of his basic constitutional right to indictment by a grand jury:

> If it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggested changes, the great importance which the common law attaches to an indictment by a grand jury, as a prerequisite to a prisoner's trial for a crime, and without which the constitution says 'no person shall be held to answer', may be frittered away until its value is almost destroyed. . . . Any other doctrine would place the rights of the citizen, which were intended to be protected by the constitutional provision, at the mercy or control of the court or prosecuting attorney. . . .

---

[3] The government had refused to supply particulars relative to paragraph (11) (Jt. App. 51), even though defendants had requested legal authorities to be relied upon at trial as tending to support the charges that a "false lower Excise Tax base" had been established, as charged in paragraph (11) (Jt. App. 34).

At the close of trial defendants moved for an evidentiary hearing for the purpose of determining whether T.D. 6340, embodying the "condition of sale" theory relied upon by the government, had ever been brought to the attention of the grand jury which returned the instant indictment (Jt. App. 209). In denying the motion, the trial court stated in his Memorandum and Order Denying Motion for a New Trial:

> Nowhere in the indictment filed in this cause is there any mention of T.D. 6340 (which is here as Government's Exhibit 89). . . . (App. 88.)

The instant case is on all fours with the decision of this Court in *Stirone* v. *United States,* 361 U.S. 212 (1960). There, the defendant was charged with violating the Hobbs Act, 18 U.S.C. §1951, by interfering with interstate commerce by means of extortion. The interstate commerce charged in the indictment involved sand which was to be used in the manufacture of ready-mixed concrete for the construction of a steel mill. The district court permitted the government to introduce evidence of an effect on commerce, not only in sand, but also in steel to be produced by the mill. The district court instructed the jury that interstate commerce could be proved by evidence of interstate shipment of either sand or steel. This Court held that it was error to submit the latter alternative to the jury since the Fifth Amendment requires prosecution to be instituted by indictment, and the indictment involved charged interference with the interstate movement of sand, and not the potential interstate movement of steel:

> The grand jury which found this indictment was satisfied to charge that Stirone's conduct interfered with interstate importation of sand. But neither this nor any other court can know that the grand jury would have been willing to charge that Stirone's conduct would interfere with interstate exportation of steel from a mill later to be built with Rider's concrete. And it cannot be said with certainty that with a new basis for conviction added, Stirone was convicted solely on the charge made in the indictment the grand jury returned. Although the trial court did not permit a formal amendment of the indictment, the effect of what it did was the same. . . . While there was a variance in the sense of a variation pleading and proof, that variation here destroyed the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury. Deprivation of such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error. . . . 316 U.S. at 217.

The instant case should be accepted for review by this Court because it conflicts with decisions of this Court and other circuits in the interpretation of an important constitutional principle set forth in *Ex Parte Bain,* 121 U.S. 1 (1887), *Stirone* v. *United States,* 361 U.S. 212, 217-218 (1960), and *Russell* v. *United States,* 369 U.S. 749, 770-771 (1962). That principle is that failure by the government to prove the material charges in the indictment as returned by the grand jury requires application of the *per se* rule set forth in *Ex Parte Bain* and *Stirone.*

In *United States* v. *DeCavalcante,* 440 F.2d 1264, 1271 (1971), and again in *United States* v. *Smith,* 474 F.2d 844, 846 (1973), the Third Circuit stated:

> The policy expressed by the Court in *Russell* "is effectuated by preventing the prosecution from modifying the theory and evidence upon which the indictment is based." *United States* v. *Silverman,* 430 F.2d 106, 110 (2nd Cir., 1970).

In *United States* v. *Somers,* 496 F.2d 723, 744 (3rd Cir., 1974), the court stated that the difference in treatment between variances and amendments was "clouded somewhat" by *Stirone,* but the test was whether the elements

of the crime charged had been modified at trial from those presented to the grand jury. If they had, the *per se* rule of *Stirone* was to be applied.

In *Gaither* v. *United States,* 413 F.2d 1061, 1072 (D.C. Cir., 1969), it was pointed out that prosecutors had attempted to avoid the *per se* rule by the "simple expedient" of proving the facts which an amended indictment would have charged. The court said:

> Thus instead of an amendment, there is a variance. And the accepted rule is that a variance does not call for dismissal of the indictment except upon a showing of prejudice.
>
> The *Stirone* case limited the use of this device. In that case, there was no actual amendment of the indictment —rather there was a variation in proof from the grand jury's charges. . . .

It was recognized by the court below that defendants had been found guilty of a conspiracy involving a "supplemental charge plan for amounts that should have been included in the wholesale price and hence in the excise tax base" (App. 34-35). Nothing in the indictment permits the inference that this theory of supplemental charges was ever presented to the grand jury or intended to be pleaded in the indictment. Rather, the court of appeals held that defendants' "conviction was based on the supplemental billing system" (App. 39) and that defendants were not prejudiced by the entirely different version of it proved at trial, because of the bill of particulars. The court thus approved the circumvention of *Ex Parte Bain, Stirone,* and *Russell* by the "simple expedient" warned against in *Gaither, supra.* The prosecutor's amendment of the indictment through proof of an offense different from that presented to the grand jury has been sanctioned because notice of the amendment can be found in the prosecutor's own bill

of particulars. The opinion below misinterprets this Court's opinions in *Ex Parte Bain, Stirone,* and *Russell,* conflicts with the lower court opinions referred to above and sets a precedent, which if followed, would erode the Constitutional right to indictment by grand jury as it has been established by this Court.

II.

THE DECISION BELOW CONFLICTS WITH CONTROLLING DECISIONS OF THIS COURT AND WIDENS AN EXISTING CONFLICT AMONG THE CIRCUITS IN ITS HOLDING THAT CONSPIRACY TO DEFRAUD THE UNITED STATES IS SUBJECT TO THE STATUTE OF LIMITATIONS FOR INTERNAL REVENUE OFFENSES.

A. Neither Subsection (1) nor (8) of Internal Revenue Code §6531 is Applicable to Conspiracy to Defraud the United States.

The court of appeals held that a conspiracy to defraud the United States, charged under the general conspiracy statute (18 U.S.C. §371), is governed by the statute of limitations for internal revenue offenses (IRC, §6531). (App. 66-69.) The asserted basis for this holding is that the "plain meaning" of §6531(1) is that a six-year statute of limitations applies to offenses involving the commission of fraud, "whether by conspiracy or not". The sole authority cited for this is *United States* v. *Lowder,* 492 F.2d 953 (4th Cir., 1974), *cert. den.,* 419 U.S. 1092 (1974), which until now was the only case to reach this result.

The decision of the court below and the *Lowder* case are in clear conflict with *United States* v. *McElvain,* 272 U.S. 633 (1926), the controlling authority of this Court on the issue, yet neither court even alluded to it. In *McElvain,*

this Court construed the statutory language now contained in §6531(1) to apply only to substantive offenses and not to conspiracies. As an additional ground of decision, *McElvain* held that, even if such language could be applied to some conspiracies, it would be limited to conspiracy offenses which "arise under" the internal revenue laws. Conspiracies charged under the general criminal statute (18 U.S.C. §371) do not "arise under" the revenue laws.[4] Since the conspiracy charged in the instant case was founded on §371 of the general criminal statute, the five-year limitations period of 18 U.S.C. §3282 for offenses arising under that statute should have been applied.

McElvain is both viable and sound. It has not been overruled and its vitality is demonstrated both by the subsequent reenactment of the statutory language without change (Cf. *Bridges* v. *United States,* 346 U.S. 209, 221 [1953]), and by the Court's specific approval of its reasoning on the "arising under" point in *Braverman* v. *United States,* 317 U.S. 49, 54 (1942). While the court of appeals quoted *Braverman* for the proposition derived from *McElvain* that "[a] conspiracy is not the commission of the crime it contemplates, and neither violates nor 'arises under' the statute whose violation is its object", it did not address itself to the question of whether a conspiracy to defraud "arises under" the Internal Revenue Code. Section 6531 is limited by its own terms to "the various offenses arising under the internal revenue laws." The opinion below and *Lowder* are not only contrary to McElvain, but to the de-

[4] §6531(8) was later enacted specifically to overcome the results of *McElvain* and *United States* v. *Scharton,* 285 U.S. 518 (1932), insofar as they precluded application of the longer statute to conspiracies to evade and defeat taxes. See discussion of the effect of this, *infra,* this part.

cisions of this Court and other circuits which have applied the general five year statute of limitations to conspiracies to defraud the United States.[5]

Although its language is ambiguous, the court of appeals may have intended to hold, as an additional ground for its decision, that §6531(a) also applies to a conspiracy to defraud.[6] This holding also would be erroneous. Subsection (8) was enacted specifically to extend the six-year statute to conspiracies to commit the offense now defined by Internal Revenue Code §7201. See *Braverman* v. *United States,* 317 U.S. 49, 54-55 (1942). Therefore, Congress adopted the precise language of that section in defining the object of the conspiracies reached by §6531(8). The rule of strict construction requires that this language cannot be extended to embrace conspiracies having other objects. Cf. *Waters* v. *United States,* 328 F.2d 739, 743 (10th Cir., 1964).

Braverman v. *United States,* 317 U.S. 49 (1942), was cited by the government and relied upon by the district court for the contrary proposition. We submit, however, that *Braverman* is not authority for this result. While *Braverman* did apply the language of §6531(8) to certain

[5] *Grunewald* v. *United States,* 353 U.S. 391 (1957); *United States* v. *Tager,* 479 F.2d 120 (10th Cir., 1973), *cert. den.* 414 U.S. 1162 (1974); *United States* v. *Klein,* 247 F.2d 908 (2nd Cir., 1957), *cert. den.* 355 U.S. 924 (1958); *United States* v. *Witt,* 215 F.2d 580, 584 (2nd Cir., 1954), *cert. den. sub. nom. Talanker* v. *United States,* 348 U.S. 887 (1954).

[6] The court said: "The six-year period, however, is not by its terms strictly limited to offenses that arise under the revenue laws. Subsections (1) and (8) apply the six-year period of limitations to conspiracies to defraud the United States and to evade taxes" (App. 69).

revenue offenses which do not use the "evade and defeat" language, it appears that the narrow scope of what is now §6531(8) was neither argued to nor specifically considered by the Court. Moreover, *Braverman* was decided on November 9, 1942, while *Spies* v. *United States,* 317 U.S. 492, the leading case defining and explaining the evasion offense, was not argued until December 18, 1942, and was not decided until January 11, 1943. Thus it is not surprising that the special meaning of the "evade and defeat" language was not referred to or noted in *Braverman.*

The decision of the court of appeals should not be allowed to stand without review by this Court. Along with *Lowder* it raises a serious doubt about the scope and correct interpretation of an Act of Congress—the statute of limitations in the Internal Revenue Code—which is obviously of great importance in the day-to-day administration of the law. It casts an intolerable pall of uncertainty over a long-standing decision of this Court. If *McElvain* has somehow withered away, it is not for the court of appeals to so declare; if *McElvain* is to be overruled, it is for this Court alone to do so.

B. Section 6531(3), IRC, is not Applicable to Conspiracy to Violate IRC §7206(2).

The court of appeals held that §6531(3) applies a six-year limitation period to a conspiracy to aid or assist in the preparation and presentation of materially false and fraudulent returns, in violation of IRC §7206(2). It cited no authority for this proposition but stated that such interpretation "would be sensible".

Our position is that *United States* v. *McElvain,* 272 U.S. 633 (1926), is dispositive of this point also, for the reasons that §6531(3) is couched only in terms of substantive offenses and that a §371 conspiracy does not "arise under" the revenue laws.

It is unnecessary to brief this point further in this Petition for two reasons: first, the *McElvain* rule applies in the same way as it does to the conspiracy to defraud discussed in Part A, *supra;* second, the points made in Parts C and D, *infra,* are of equal validity so long as any one of the three objects of the conspiracy is governed by the five-year general statute of limitations.

C. The Courts Below Ruled Contrary to the Controlling Decision of this Court Holding that Time-Barred Objects of a Conspiracy having Multiple Objects must be Withdrawn from Consideration of the Trier of Fact.

The court of appeals held, alternatively, that even if a five-year statute of limitations was applicable to one or two of the objects of the three-pronged conspiracy charged in this case, the conviction was not time-barred. One ground of this holding was that the conspiracy was shown to have continued to within five years of the indictment. (See part D, *infra.*) The other ground was that the second object of the conspiracy alleged was to violate Internal Revenue Code §7201, an offense concededly subject to the six-year statute (IRC §6531[8]).

The Opinion of the Court below is obscure on this point. It is stated that ". . . as to that portion of the indictment [conspiracy to violate §7201], there was no bar" (App. 68). This statement fails to address a significant question which the petitioners argued in both the district court and the court of appeals, *viz.,* where an indictment charges a conspiracy having multiple objects, how must the court deal with any of the objects which, if standing alone, would be time-barred?

This Court has given one answer to that question in *Yates* v. *United States,* 354 U.S. 298, 312 (1957), holding that such time-barred object must be withdrawn from the consideration of the trier of fact, and that failure to withdraw it is reversible error. The Sixth Circuit applied *Yates* in *Wellman* v. *United States,* 253 F.2d 601 (1958). The Second Circuit had earlier reached a similar result in *United States* v. *Albanese,* 224 F.2d 879 (1955). In *Yates,* as in the instant case, the statutory period on one of the objects of the conspiracy had not expired. That did not save the *Yates* conviction. That fact cannot save the conviction in this case, contrary to the implication of the quotation above.

Petitioners have argued, both in the district court and the court of appeals, that it was error for the court not to withdraw from consideration the first (fraud) and third (false return) objects of the alleged conspiracy. Neither court considered that it was necessary to deal specifically with this question. We submit, however, that the question was properly before those courts and that their failure to consider the point was clear error under *Yates.*

Moreover, even *Yates* does not clear up a more basic question: where an indictment charges a single conspiracy having multiple objects, and where different statutes of limitation apply, which time period governs? Such a conspiracy is but one offense which can result in only one jeopardy and one punishment. *Sanabria* v. *United States,* ..... U.S. ....., 46 U.S. Law Week 4646 (June 14, 1978). Therefore, only one statute of limitations could apply, and that, we submit, should be the shortest applicable period.

D. The Courts Below Ruled Contrary to Established Precedent in the Courts of Appeals in Holding that Overpayment of Tax May not be Set Off Against Deficiencies, to Establish the Defense that there was no Substantial Net Deficiency for the Period in Question.

To establish their contention that two of the objects of the conspiracy could not be considered in determining guilt or innocence because they were time-barred, petitioners showed that Fruehauf Corporation had made significant overpayments of its excise taxes for all of the taxable periods between the first quarter of 1962 and the last quarter of 1965, and that the Internal Revenue Service had sustained those claims. The overpayment for the last quarter of 1965 was and is of critical importance because the filing of an understated manufacturers' excise tax return for that quarter was the only overt act alleged or proved to have occurred within five years of the return of the indictment, a fact relied upon by the court of appeals to support its alternative holding that there was no time bar even under the five-year statute.

The government's computation showed a total deficiency for that quarter of $27,719.27 (Gov't. Exhibit 242B; 243A & B); the overpayment shown by defendants was $25,250.09 (Defense Exhibit 74), a difference of $2,469.18 in a return on which the tax paid was almost four million dollars (Jt. App. 29). The district court refused to consider the issue of whether that amount of net deficiency was insubstantial (Jt. App. 1542) and the Court of Appeals affirmed, stating that petitioners' ". . . contention that against these deficiencies they are entitled to set off certain overpayments . . . in order to defeat criminal liability is ridiculous" (App. 73).

Despite this harsh characterization by the court, our position is supported by settled authority. It is clear that,

in conspiracy cases under 18 U.S.C. §371, the government must prove an overt act within the applicable period of limitations. *Grunewald* v. *United States,* 353 U.S. 391, 396 (1957). The overt act relied upon by the government and the court below is the filing of an excise tax return in which ". . . the purported Excise Tax liability was substantially understated. . ." (Indictment, Jt. App. 27). Numerous cases have held that, where "substantial understatement" of tax due on a return is in issue, defendant is entitled to show the existence of unclaimed deductions, credits or overpayments of the tax which existed at the time the returns were filed. *United States* v. *Wilkins,* 385 F.2d 465, 470 (4th Cir., 1967), *cert. den.* 390 U.S. 951 (1968), and cases therein cited.

Under the rule of the cited cases, petitioners were entitled to consideration of the factual question whether, in all of the circumstances of the case, the net understatement of tax for the fourth quarter of 1965 was substantial. If it was not, then proof of the overt act had failed, and the five-year limitations period required that the first and third objects of the conspiracy should have been stricken from the case. *Yates* v. *United States,* 354 U.S. 298, 312 (1957). The court refused to consider the issue of substantiality and, of course, it did not strike the allegations relating to the first and third objects of the conspiracy. On the contrary, it found defendants guilty of a conspiracy having all three objects charged in the indictment.

In arguments advanced in the courts below the government has sought to deny the prejudicial effect of the court's refusal to consider these issues by characterizing the additional objects of the conspiracy as "surplusage". We agree that they should have been stricken and that their deletion would not have invalidated the indictment. But the court did not strike the allegations; it held that they

were validly proved and not time-barred. Thus any question of "surplusage" is out of the case. Compare *United States* v. *Albanese,* 224 F.2d 879 (1955), *cert. den.* 350 U.S. 845 (1955). Petitioners were clearly prejudiced because they were entitled to determination of the issue of substantiality. They were denied any determination of that issue and were adversely affected by the court's consideration of the time-barred objects.

In conclusion, then, the courts below have essentially ignored controlling law, with the result that confusion and error have been injected into the administration of the criminal provisions of the Internal Revenue Code. We respectfully submit that this Court should intervene to make clear what the rules are in this important area of criminal tax law.

III.

THE INDICTMENT FAILED TO ALLEGE ESSENTIAL ELEMENTS OF OFFENSES CHARGED AS OBJECTS OF THE CONSPIRACY

Defendants moved to dismiss the instant indictment (Jt. App. 42) on grounds that it failed to allege an essential element of the offenses charged as objects of the conspiracy. While 26 U.S.C. §7201 and §7206(2) require "willfulness" as an essential element of each offense, there was no allegation of "willfulness" in paragraphs (2) and (3) of the indictment, and there was no finding of "willfulness" by the trial court in his findings of fact relating to these object offenses (Jt. App. 205). The court of appeals, relying on *Wong Tai* v. *United States,* 273 U.S. 77, 81 (1927), held that it is not necessary for an indictment to set forth the essential elements of offenses charged as being objects of a criminal conspiracy. Identification of the object offenses by reference to the specific statutory sections was

held sufficient (App. 70). Alternatively the court held that an allegation in the overt acts section of the indictment that defendants "then and there well knew" that Fruehauf' excise tax liability was understated, was a sufficient allegation that defendants did have a willful state of mind as to the object offenses of the conspiracy (App. 70-71). Defendants submit that the court's opinion on this point is directly in conflict with decisions in other circuits and that the Court should accept this case for review to decide this important principle of criminal law.

Numerous cases in other circuits have held that when a substantive offense against the United States is alleged as the object of a conspiracy every essential element of the substantive offense must be set forth in the indictment. *Conrad* v. *United States,* 127 F. 798, 800 (5th Cir., 1904). involved dismissal of a conspiracy indictment for failure to allege "knowingly and wilfully" in the object offense. In *Middlebrooks* v. *United States,* 23 F.2d 244, 245 (5th Cir., 1928), a conspiracy indictment was dismissed for failure to allege that the intoxicating liquors transported were "for beverage purposes" as required in the statute creating the object offense. In *United States* v. *Comstock,* 162 F. 415 (D.C.R.I., 1908), an indictment charging conspiracy to conceal assets from a trustee in bankruptcy was dismissed for failure to allege that concealment was done "knowingly and fraudulently" as required in the underlying statute.

A recent case, on all fours with the case at bar, is *Nelson* v. *United States,* 406 F.2d 1136 (9th Cir., 1969), where the court held that an indictment for conspiracy to transport altered securities in violation of 18 U.S.C. §2314, was fatally defective because it did not allege that the defendant's acts had been accompanied by the "unlawful and fraudulent intent" required by §2314. The court reached

this result even though the *conspiracy* was alleged to have been entered "willfully and knowingly", just as in the instant case.

The court of appeals' determination that it is sufficient in a conspiracy indictment to identify the object offense through reference to the statutory sections involved conflicts with the decision of this Court in *United States* v. *Hutcheson,* 312 U.S. 219, 229 (1940), involving the sufficiency of an indictment for conspiracy to violate the Sherman Act. The Court held:

> "In order to determine whether an indictment charges an offense against the United States, designation by the pleader of the statute under which he purported to lay the charge is immaterial. * * *"

See also *United States* v. *Lynch,* 180 F.2d 696, 698 (7th Cir., 1950); *United States* v. *Clark,* 416 F.2d 63, 64 (9th Cir., 1969). Thus, the citation of statutes at the end of or in the body of an indictment cannot replace missing allegations. *Breeze* v. *United States,* 398 F.2d 178 (10th Cir., 1968); *Masi* v. *United States,* 223 F.2d 132 (5th Cir., 1955). In *United States* v. *Wabaunsee,* 528 F.2d 1 (7th Cir., 1975), the court held that failure to allege an essential element of the offense was reversible error, not cured by citation of the underlying statute, even though there had been no objection at trial.

Alleging that defendants "willfully conspired" or "willfully committed overt acts" does not cure a failure to allege willfulness as part of the object offense. *Conrad* v. *United States, supra,* at pp. 800-801; *Middlebrooks* v. *United States, supra,* at 245.

The decision below is in clear conflict with cases discussed above. This Court should resolve that conflict.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX

APPENDIX

In the United States Court of Appeals

FOR THE SIXTH CIRCUIT

No. 76-2313

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

FRUEHAUF CORPORATION, WILLIAM E. GRACE and ROBERT ROWAN,

Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Michigan.

Decided and Filed May 5, 1978.

Before: WEICK, PECK and LIVELY, Circuit Judges.

PECK, Circuit Judge. Defendants-appellants Fruehauf Corporation, William E. Grace, and Robert Rowan were indicted for conspiring, in violation of 18 U.S.C. § 371, to defraud the United States by obstructing the lawful governmental functions of the Internal Revenue Service, to attempt to have appellant Fruehauf Corporation evade illegally the payment of federal excise taxes, and to aid or

assist in the preparation and presentation of materially false and fraudulent excise tax returns for the appellant Fruehauf. Following a lengthy trial without a jury, the district judge found that appellants were guilty as charged. Appellant Fruehauf Corporation was sentenced to pay a $10,000 fine. Appellants Grace and Rowan were each sentenced to serve a prison term of six months and one day (the one day was suspended), followed by a two year period of unsupervised probation, and to pay a $10,000 fine. Appellants perfected this appeal. We affirm.

I

District Judge Thomas P. Thornton entered 142 findings of fact in his opinion [1] to support his conclusion that appellants were guilty as charged of having engaged in a conspiracy in violation of 18 U.S.C. § 371.[2] After examining the voluminous record in this case, we conclude that Judge Thornton's findings of fact were supported by substantial evidence and were not clearly erroneous.[3] The following statement of facts is based on the findings made by Judge Thornton.

[1] District Judge Thornton's opinion has been reported unofficially. *United States* v. *Fruehauf Corporation, et al.*, 75-2 U.S. Tax Cas. ¶ 16,207, 36 Am. Fed. Tax R.2d 75-5979 (E.D. Mich. July 17, 1975).

[2] 18 U.S.C. § 371 provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

The Indictment: The Parties and the Excise Tax Provisions Involved

The corporation indicted in the present case, appellant Fruehauf, is a very large and well-known manufacturer of trailers. Appellants Grace and Rowan were top executives of the Fruehauf Corporation. During the period of the alleged conspiracy, appellant Grace served as vice-president (1955-57), executive vice-president (1957-58), president (1958-65), and chief executive officer (1959-65), and appellant Rowan held the positions of controller (1955-64), vice-president (1962-64), and vice-president, finance (1964-65).

Named in the indictment along with appellant Fruehauf Corporation and appellant executives Grace and Rowan

[3] Appellants argue that the district judge's findings are clearly erroneous even when the evidence is viewed in the light most favorable to the United States. Appellants complain that the district judge did not consider their evidence, and they refer this Court to the evidence in the record that support their version of the facts.

While appellants correctly acknowledge that this Court reviews the findings of the district judge under the "clearly erroneous" standard and must consider the evidence in the light most favorable to the United States as to the specific findings made by the district judge, the arguments pressed by appellants on this issue fail to recognize that a district judge's finding of fact is not clearly erroneous simply because there is evidence in the record that might support a different finding. Our review of the evidence leads us to conclude that all the findings of fact were supported by substantial evidence. In fact, this was not a close case. For a few examples that illustrate the lack of merit to appellants' attack on the district judge's findings of fact, see footnotes 9, 10, 13, 15, and 16.

were two other Fruehauf executives, unindicted co-conspirators Kenneth A. Morris and Robert M. Chawner. From 1951 through 1965, Morris was the manager of appellant Fruehauf's Tax Department. In that position, Morris was responsible to appellant Rowan for the correct reporting of appellant Fruehauf's taxes. From 1955 to 1964, Chawner was appellant Fruehauf's assistant controller, and from 1962 to 1964, he was the controller of the Fruehauf Division of the appellant Fruehauf Corporation.

Section 4061 of the Internal Revenue Code of 1954, 26 U.S.C. § 4061, imposes a tax on the sale of motor vehicles and parts (including trailers) by the manufacturer.[4] The

[4] As originally enacted in 1954, 26 U.S.C. § 4061(a) provided:

(a) Automobiles.—There is hereby imposed upon the following articles (including in each case parts or accessories therefor sold on or in connection therewith or with the sale thereof) sold by the manufacturer, producer, or importer a tax equivalent to the specified percent of the price for which so sold:

(1) Articles taxable at 8 percent, except that on and after April 1, 1955, the rate shall be 5 percent—

Automobile truck chassis.
Automobile truck bodies.
Automobile bus chassis.
Automobile bus bodies.
Truck and bus trailer and semitrailer chassis.
Truck and bus trailer and semitrailer bodies.
Tractors of the kind chiefly used for highway transportation in combination with a trailer or semitrailer.

A sale of an automobile, truck, bus, truck or bus trailer or semitrailer shall, for the purposes of this paragraph, be considered to be a sale of the chassis and of the body.

(2) Articles taxable at 10 percent except that on and after April 1, 1955, the rate shall be 7 percent—

Automobile chassis and bodies other than those taxable under paragraph (1).

(footnote continued)

tax is computed by applying the tax rate established in § 4061 to the motor vehicle or part "price." That "price" is defined in § 4216(a) of the Internal Revenue Code of 1954, 26 U.S.C. § 4216(a), as the price for which the article is sold;[5] however, § 4216(b), as amended effective January 1, 1959, provides for a constructive sales price that enables a manufacturer which sells at both retail and wholesale to compute the excise tax on all sales based upon the highest

(footnote continued)

Chassis and bodies for trailers and semitrailers (other than house trailers) suitable for use in connection with passenger automobiles.

Motorcycles.

A sale of an automobile, trailer, or semitrailer shall, for the purposes of this paragraph, be considered to be a sale of the chassis and of the body.

(b) Parts and accessories.—There is hereby imposed upon parts or accessories (other than tires and inner tubes and other than automobile radio and television receiving sets) for any of the articles enumerated in subsection (a) sold by the manufacturer, producer, or importer a tax equivalent to 8 percent of the price for which so sold, except that on and after April 1, 1955, the rate shall be 5 percent.

[5] 26 U.S.C. § 4216(a) provides:

(a) *Containers, packing and transportation charges.*—In determining, for the purposes of this chapter, the price for which an article is sold, there shall be included any charge for coverings and containers of whatever nature, and any charge incident to placing the article in condition packed ready for shipment, but there shall be excluded the amount of tax imposed by this chapter, whether or not stated as a separate charge. A transportation, delivery, insurance, installation, or other charge (not required by the foregoing sentence to be included) shall be excluded from the price only if the amount thereof is established to the satisfaction of the Secretary or his delegate in accordance with the regulations.

price for which the motor vehicle or part is sold at wholesale.[6]

Appellant Fruehauf Corporation sold 94% of its trailers at retail and the remaining 6% at wholesale. By virtue of § 4216(b) and of a private ruling obtained by appellant Fruehauf in 1949, appellant Fruehauf used its wholesale price as the base for excise tax computations on all sales.[7]

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[6] 26 U.S.C. § 4216(b)(1), as amended effective January 1, 1959, provides:

(b) *Constructive sale price*—

(1) *In general.*—If an article is—

(A) sold at retail,

(B) sold on consignment, or

(C) sold (otherwise than through an arm's length transaction) at less than the fair market price.

the tax under this chapter shall (if based on the price for which the article is sold) be computed on the price for which such articles are sold, in the ordinary course of trade, by manufacturers or producers thereof, as determined by the Secretary or his delegate. In the case of an article sold at retail, the computation under the preceding sentence shall be on whichever of the following prices is the lower: (i) the price for which such article is sold, or (ii) the highest price for which such articles are sold to wholesale distributors, in the ordinary course of trade, by manufacturers or producers thereof, as determined by the Secretary or his delegate. This paragraph shall not apply if paragraph (2) applies.

[7] Prior to the amendment of 26 U.S.C. § 4216(b) in 1959, appellant Fruehauf had the benefit of a private letter ruling issued to it by the Treasury Department, dated December 29, 1949, stating that the excise tax was to be based on the discounted price at which sales were made at wholesale to independent distributors. Except for the question of the excise tax treatment of a warranty allowance to distributors, there was no issue at trial as to appellant Fruehauf's entitlement through the period of the alleged conspiracy to compute its excise tax on all sales based on the wholesale price, even though over 90% of its sales were at retail.

Just prior to the beginning of the conspiracy, in December, 1956, distributors of appellant Fruehauf Corporation paid 61.75% of the list price for the trailers, a discount of 38.25%.

Section 6416(c) of the Internal Revenue Code of 1954, 26 U.S.C. § 6416(c), provides for tax credits that reduce the excise tax liability of a manufacturer.[8] A tax credit is given when a finished taxable article sold by the manufacturer includes parts that have previously been subjected to a separate excise tax. Hence, excise tax credits are given when trailers are sold with tires upon which an excise tax,

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[8] 26 U.S.C. § 6416(c) provides:

(c) *Credit for tax paid on tires or inner tubes.*—If tires or inner tubes on which tax has been paid under chapter 32 are sold on or in connection with, or with the sale of, another article taxable under chapter 32, there shall (under regulations prescribed by the Secretary or his delegate) be credited (without interest) against the tax imposed on the sale of such other article, an amount determined by multiplying the applicable percentage rate of tax for such other articles by—

(1) the purchase price (less, in the case of tires, the part of such price attributable to the metal rim or rim base), if such tires or inner tubes were taxable under section 4071 (relating to tax on tires and inner tubes); or

(2) if such tires or inner tubes were taxable under section 4218 (relating to use by manufacturer, producer, or importer), the price (less, in the case of tires, the part of such price attributable to the metal rim or rim base) at which such or similar tires or inner tubes are sold, in the ordinary course of trade, by manufacturers, producers, or importers thereof, as determined by the Secretary or his delegate.

The credit provided by this subsection shall be allowable only in respect of the first sale on or in connection with, or with the sale of, another article on the sale of which tax is imposed under chapter 32.

in this case imposed by § 4071 of the Internal Revenue Code of 1954, 26 U.S.C. § 4071, has been previously levied. Appellant Fruehauf Corporation took such credits on the tires that were placed on their trailers.

Appellant Fruehauf Corporation could thus reduce its excise tax liability by (1) reducing the price at which the trailers were sold at wholesale to distributors and (2) increasing the price paid for tires that were to equip the trailers. If, however, Fruehauf Corporation were to cut its excise tax liability simply by reducing its wholesale trailer prices and increasing the prices paid for tires, the net income total would be reduced more by the decreased gross income and increased tire expense than increased by the excise tax savings.

The indictment in the present case, brought November 9, 1970, alleged that appellants conspired to obtain by two fraudulent schemes the best of two worlds, excise tax savings and income unaffected by reduced wholesale trailer prices and increased tire payments. The first scheme, which involved a supplemental billing plan, sought to reduce the excise tax base without reducing gross income. The second scheme was directed at generating excessive excise tax credits by computing the tire tax credit on invoice prices without adjustment for rebates. As overt acts charged to have been committed to further the conspiracy, the indictment alleged the filing of quarterly manufacturers excise tax returns for 37 consecutive quarters, beginning in the final quarter of 1956 and extending through the last quarter of 1965, returns which understated the excise tax liability of appellant Fruehauf Corporation in the amount of $12,344,587.31.

The Supplemental Billings Scheme

1. The Meeting in Washington, D. C.: Approval of the Supplemental Billing System.

On December 13, 1956, appellant Rowan and co-conspirator Morris met with appellant Fruehauf's Washington, D. C. counsel, Raymond Cushwa, of the law firm of Davies, Richberg, Tydings & Landa, and with W. K. Engel, of the accounting firm of Touche, Niven, Bailey & Smart. The purpose of the meeting was to obtain Cushwa's and Engel's approval of a "supplemental charge plan" that had originally been drafted by co-conspirator Chawner. The supplemental charge plan would break out of the price of a trailer charges for certain "extra" services allegedly rendered to appellant Fruehauf's distributors and would bill for those services separately. At the same time, the discount to distributors would be increased, and by lowering the wholesale price of the trailer, appellant Fruehauf's excise tax liability would also be reduced because the excise tax base for both retail and wholesale sales was computed on the wholesale price.

Engel, in an inter-office memorandum written five days after the meeting, summarized the proposal presented on behalf of appellant Fruehauf by appellant Rowan and co-conspirator Morris.

> Fruehauf performs certain services for its wholesale customers which it does not perform for its retail customers. In the past the charges for these extras has been included in the invoice price to distributors and consequently in the excise tax base. Fruehauf has concluded that the charges for these extra services should be made separately and not included in the invoice price of the trailers in order to make the invoice price of trailers to distributors comparable to that to retailers. It is anticipated that the extra charges to be

billed separately to distributors would approximate the $260 reduction in selling price due to the proposed additional discount so that the total received per trailer from distributors would be what it is at present. The advantage would be in obtaining a lower wholesale base on which excise tax would have to be paid and thus a saving in excise tax of about $26 per trailer on both wholesale and retail sales.

The extra charges to distributors which Fruehauf has proposed are as follows:

EXPENSE	BASIS FOR CHARGE	EXPENSE PER UNIT
Advertising	National advertising charge ÷ total units sold	$ 34.00
General sales expense	Executive sales expense per unit sold	58.00
Interest	4½% of average balance of equipment accounts receivable which are at present carried by Fruehauf until units are sold by distributors	164.00
Sales engineering	Estimated	5.00
Sales manuals, technical bulletins, etc.	Estimated	2.00
Legal and accounting services	Estimated	5.00
		$268.00

(Government Exhibit 16).

Cushwa and Engel approved this proposal, stating to appellant Rowan and co-conspirator Morris that it was generally in accord with the law governing manufacturers excise tax, but conditioned their approval on the observ-

ance of certain procedures. First, it would be necessary to be able to demontrate that a particular distributor actually received the service for which the distributor was charged. Second, the proposed charges would need to be based upon the cost of the services performed; the amounts charged in a specific case had to equal or be less than the value of the services actually performed. Third, records would have to be maintained showing the services rendered for each distributor and for each of the categories of supplemental fees charged. Cushwa and Engel told appellant Rowan and co-conspirator Morris that a flat charge to a distributor for some service never received, even though billed separately, was part of the selling price of the trailer and would have to be included in the excise tax base. Appellant Rowan and co-conspirator Morris were thus put on notice that appellant Fruehauf's counsel approved the supplemental charge plan on the conditions that records would be maintained which would demonstrate that the supplemental charges were for extra services actually performed and that the value of the services rendered equalled or exceeded the amounts charged.[9]

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[9] District Court Finding No. 23 states:

> Messrs. Rowan, Morris and Chawner were aware that Cushwa's approval of the exclusion of the supplemental charges from Fruehauf's constructive tax base was predicated upon the maintenance of records which would demonstrate that the charges were for actual extra services performed, and that the value of the services in a specific case equalled or exceeded the amounts charged (GX 2, Q. and A. 186-188; Tr., V. 5, pp. 526-527).

Appellants contend that testimony taken from the attorney Cushwa in a deposition and read into the record during the cross-examination of co-conspirator Morris showed that the supplemental charges for services to distributors did not have to be limited to the actual

(footnote continued)

2. Implementation and Control of the Supplemental Billing System.

Following the December 13, 1956, meeting in Washington, D.C., appellant Rowan personally called all of appellant Freuhauf's distributors in order to inform them about the implementation of the supplemental charge plan. The plan increased the discount to distributors to 42% off the list price. Along with this increased discount, however, the distributors received from appellant Fruehauf supplemental billings for amounts designated on the special invoices as "advertising," "management consulting fees," and "interest."

These monthly supplemental charges to distributors were posted as credit entries to Fruehauf's advertising, general administrative, and interest earned accounts. Distributors

(footnote continued)
costs incurred by appellant Fruehauf so long as the charges were reasonable and that the charges were excludable from the excise tax base, notwithstanding the lack of records because it was the existence of the services and not the records that justified the exclusion. The problem with this argument is that it ignores the evidence supporting the district judge's finding. The memorandum written by Engel, admitted into evidence as Government Exhibit 16, stresses that the approval given to the supplemental charge plan, given at the December 13, 1956, meeting in Washington, D.C. by Cushwa and Engel, was conditioned on the limiting of supplemental charges to the value of the services and on the maintenance of records to substantiate the rendition of services. In addition, the testimony of co-conspirator Morris at trial and of appellant Rowan in an interview with the Internal Revenue Service in 1967 was that there was an understanding at Fruehauf that records would have to be maintained to substantiate the services that were billed in the supplemental charge plan. Without the records, appellant Fruehauf would not be able to prove that the charges for the services could be properly segregated from the billing for the cost of the trailers and there would not be a safeguard against tax evasion.

were advised by appellant Fruehauf that the supplemental charges should be posted on the distributors' books as selling or administrative expenses and not as part of the trailer costs so that appellant Fruehauf's billing system would not be misinterpreted by the Internal Revenue Service. As an additional precaution, the invoices for the supplemental charges were mailed to distributors in envelopes marked "personal and confidential." Co-conspirator Chawner told F. S. Newman, manager of appellant Fruehauf's Sales Department, that the supplemental billing practice should be kept on a confidential basis so that appellant Fruehauf's tax position would not be endangered.

This concern was legitimate. The supplemental charge plan as implemented was designed so that the total of the supplemental billings to each distributor equalled the 3.75% increase in the discount extended to distributors at the time of the institution of the supplemental charge plan.[10]

[10] District Court Finding No. 38 states:

> As designed and implemented, the monthly supplemental billing to each distributor equalled, in total, the 3.75 percent increase in discount (GX 22; GX 3, Q. and A. 394).

The evidence relied upon by appellants in contending that this finding of fact was clearly erroneous only supports the finding. Appellants note that appellant Rowan testified that it was agreed with distributors that a condition of separately billing them for the services under the supplemental charge plan was that such supplemental charges would not exceed 3.75% of the list price of new trailers invoiced to them. Conveniently overlooked by appellants is the fact that the limitation on the total supplemental charges to each distributor was equal to the increase in the distributor discount that was instituted along with the supplemental billings. Appellants also ignore the evidence of the "Distributor Analysis of Price Adjustment" work sheets, introduced into evidence as Government Exhibit 22.

Appellant Fruehauf's home office billing department monitored the supplemental charge plan by means of "Distributor Analysis of Price Adjustment" work sheets, which were used to reconcile the supplemental billing figures against the increase in the discount to the distributors. A running account of the amounts by which total supplemental billings exceeded or fell short of the increase in discount was kept by means of a credit or debit entry under a column entitled "Adjustment Due Customer." Appellant Fruehauf kept distributors informed as to the status of this running account in monthly "Status of Excise Tax Savings" reports.

Moreover, it was impossible for a distributor to avoid full payment of the supplemental charges. Trailer sales to distributors were made on open account with thirty or ninety day terms. The monthly supplemental charge for interest was computed at the rate of 4½% per annum on the month-end balance of each distributor's open receivables account. No adjustment was made if payment was received by Fruehauf within the thirty or ninety day terms of the trailer invoices. The monthly supplemental charge for advertising and management consulting were computed by subtracting the interest charge from the "net selling price adjustment" (which was 3.75% of the list price when the additional discount given to the distributors was 3.75% of the list price) and then allocating the remainder to advertising and management consulting. If, however, a distributor would return a trailer to appellant Fruehauf Corporation, the supplemental billings were proportionately cancelled; if there were no trailer sales to a distributor, there were no supplemental billings. Appellant Fruehauf Corporation could thus receive roughly the same payment from distributors as they would have without the supplemental billings plan, but had a lowered wholesale price as its excise tax base, which meant reduced excise taxes on the trailers sold to all customers.

3. Amounts in the Supplemental Billings Increase

Despite the fact that the supplemental billing system had been approved by counsel only on the conditions that records be maintained to show that the supplemental charges were for actual services rendered and that the value of the services equalled or exceeded the amounts charged, by July, 1957, only nine months after the effective date of the supplemental charge plan,[11] the charges for advertising and management consulting fees had risen to amounts vastly in excess of the amounts that appellant Rowan and coconspirator Morris had represented to the attorney Cushwa as the proper charges for the extra services allegedly rendered to the distributors. In 1957, the distributor Motor Truck Equipment Company was charged $147.34 per unit for advertising, an increase from $34 in December, 1956. In November, 1957, Berman Sales Company was charged $124.91 per unit for advertising, also increased from $34 in December, 1956.[12]

Because the charges for advertising, management consulting, and interest were vastly overstated, appellant

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[11] When the supplemental charges were instituted, they were applied retroactively to October 1, 1956.

[12] The district judge found that in July, 1957, one distributor was charged in excess of $600 per unit for national advertising. The finding is not clearly erroneous because it is substantiated in Government Exhibit 22, but this Court's statement of facts points to other figures taken from Government Exhibit 22 in order to present a more accurate indication of the level of supplemental charges in the summer and autumn of 1957.

Fruehauf's budget was being distorted. This distortion was rectified in August, 1957, when the supplemental charges were taken out of the expense and income account postings and thereafter posted as reductions to the cost account applicable to new trailers.

In July, 1958, an internal Fruehauf study was made, which demonstrated that the average supplemental charges to each distributor under the categories "advertising" and "management consulting" were in excess of the amounts conditionally approved by the attorney Cushwa at the December, 1956, meeting in Washington, D. C. Consequently, in the autumn of 1958, co-conspirator Morris expressed concern to appellant Rowan that the records maintained by appellant Fruehauf Corporation were not sufficient to substantiate the supplemental charges for services being rendered to distributors. Nevertheless, appellant Rowan, who was responsible for appellant Fruehauf's record keeping, did not cause Fruehauf Corporation to maintain records to demonstrate that a certain distributor actually had received the service for which it was charged or that the value of the service in a specific case equalled or exceeded the amounts charged.

It was during this initial period of swelling supplemental charges that appellant Grace became aware of and educated himself about the supplemental billing system. In fact, in a letter dated October 11, 1957, to Christopher Hammond, President of Great Dane Trailers, appellant Grace boasted "The excise tax problem is one which I believe no one has gone into any deeper and come up with more ways to save money than yours truly." Also in 1960, appellant Grace was aware of a Fruehauf memorandum titled "The Excise Tax Story," which described the supplemental billing procedures and indicated that Fruehauf had saved $921,324 in excise taxes in 1959 as a result of the supplemental charge plan.

4. Treasury Regulation 330.1-1(b) and Appellant Fruehauf's Response.

On December 16, 1958, the Internal Revenue Service published in the Federal Register, Treasury Regulations on Manufacturers Excise Tax. T. D. 6340, 1959-1 Cum. Bul. 694, Regulation 330.1-1(b) provided:

> Any charge which is required by a manufacturer, producer, or importer to be paid as a condition of sale of a taxable article and which is not attributable to an expense falling within one of the exclusions provided in Section 3441(a), is includible in the sale price upon which the tax is based. It is immaterial for this purpose that the charge may be paid to someone other than the manufacturer, producer, or importer, or that it may be separately billed to the purchaser as one earmarked for expenses incurred or to be incurred in his behalf, as for example, for advertising at the national or local level, for a demonstration or display of the article, for a sales promotion program, or otherwise.

As a result of the promulgation of this regulation, appellant Fruehauf did not eliminate its supplemental billing for advertising and include that cost in the wholesale price. Rather, appellant Fruehauf changed in its supplemental charges the billing designation "advertising" to "printed matter, catalogues, etc." Co-conspirator Morris testified at trial that the printed matter charge was based on the $7 per unit sales engineering and sales manual expenses in the plan presented to Cushwa and Engel in December, 1956; apparently no study was made to justify the new printed matter charge. The printed matter charge was in effect from January, 1959, through December, 1964.

5. Excise Tax Audit 1958-59; Indiana Gross Tax Incident.

Internal Revenue Service Agent Francis J. Rochefort conducted an excise tax audit of appellant Fruehauf Corporation from the fall of 1958 to November, 1959. On December 5, 1958, co-conspirator Morris conferred with the attorney Cushwa concerning the audit and the excise tax procedures followed by appellant Fruehauf. Fruehauf Corporation did not want a close scrutiny of the supplemental billing system. Co-conspirator Morris told Cushwa that the invoices for the supplemental billings were being kept in a completely separate file from the trailer invoices so that it would only be remotely possible that the examination would turn up the billings.

During the course of the audit Revenue Agent Rochefort asserted that Fruehauf had erroneously excluded from its excise tax base an Indiana gross income tax included in the invoice price of the trailers sold at wholesale to three distributors, Warner-Fruehauf Trailer Company, Motor Truck Equipment Company, and Berman Sales Company. Appellant Fruehauf responded by proposing a compromise with the Internal Revenue Service. Fruehauf offered to refund the amounts collected from the three distributors.

On August 28, 1959, the Internal Revenue Service accepted the Fruehauf proposal and agreed that if the refunds were made, no tax deficiency would be asserted. Credit memoranda, prepared by co-conspirator Chawner and personally approved by appellant Rowan, were issued to the Warner-Fruehauf Trailer Company, the Motor Truck Equipment Company, and the Berman Sales Company. In the next monthly billing to the three distributors, however, the same amounts that had been credited to their accounts pursuant to the compromise between appellant Fruehauf Corporation and the Internal Revenue Service

were rebilled to them as extra charges, in addition to the normal monthly supplemental charges, under the designation "printed matter, catalogues, etc."

6. The Hobbs Trailer Company Installation Charge and the Appellant Fruehauf Handling Charge for Retail Sales.

In 1955, appellant Fruehauf Corporation acquired Hobbs Trailer Company. Examination by Fruehauf of the excise tax procedure of Hobbs as to its installation charge triggered an inquiry into the possible exclusion from the excise tax base of a $50 Fruehauf charge for handling.

On November 15, 1955, the attorney Cushwa wrote to co-conspirator Morris. Cushwa advised that the costs incurred in putting the trailer in perfect condition for delivery were not excludable from the excise tax base. On December 12, 1955, Cushwa again wrote to co-conspirator Morris, advising Morris that he had consulted with a Mr. Dodge of the Internal Revenue Service. Cushwa stated that the opinion of Mr. Dodge was that if a handling charge was included in the sales price, the charge was includable in the excise tax base and that only if a separate charge for installation had been made to the customer could the charge be excluded from the excise tax base.

In a memorandum dated December 14, 1955, addressed to appellant Rowan, co-conspirator Morris compared the Hobbs method of computing tax on a new trailer sale with the method used by appellant Fruehauf Corporation. Co-conspirator Morris showed that appellant Fruehauf would have paid a greater tax than Hobbs on the same transaction; however, Hobbs had an installation charge included in its sales price that was excluded from its excise tax base. Co-conspirator Morris stated that Hobbs was in error to exclude the installation charge from the excise tax base.

On December 5, 1958, Cushwa advised co-conspirator Morris that the handling charge to retail customers need not be included in the excise tax base so long as the charge was not made to distributors. Cushwa and co-conspirator Morris reviewed trailer invoices, which indicated that a handling charge was being made to distributors. It was decided to discontinue the practice of charging distributors for a handling charge.

On March 6, 1959, appellants Rowan and Grace and co-conspirator Morris discussed the excise tax aspect of Fruehauf's handling charge. Appellant Grace stated that it was his impression that Hobbs Trailer Company, before it had been acquired by Fruehauf Corporation, had obtained a ruling from the Internal Revenue Service to the effect that a "get ready" charge could be included in the list price of the trailers but excluded from the excise tax base. Co-conspirator Morris subsequently obtained the Hobbs ruling, which was in fact a District Director's letter. That letter approved the exclusion of an installation charge from the excise tax base when the installation charge varied from sale to sale depending upon the cost of labor and parts.

At an April 13, 1959, meeting, appellant Rowan and co-conspirator Morris represented to Cushwa that appellant Fruehauf's handling charge in connection with retail sales was exactly the same as the installation charge of Hobbs Trailer Company. Accepting the representation of appellant Rowan and co-conspirator Morris, Cushwa advised that appellant Fruehauf Corporation could use the Hobbs method of including the handling charge in the retail price but excluding that amount from the list price for the calculation of the excise tax base.

Fruehauf's handling charge, however, was not the same as the Hobbs installation charge. Fruehauf's handling charge for retail sales was not limited to installation but covered such diverse items as repairing minor manufacturing defects, replacing defective light bulbs, repairing scratches, lubricating the wheels, washing the tires, and hitching the trailer to the customer's tractor. Appellant Fruehauf always charged $50 for these services, without regard to the actual costs incurred. Furthermore, appellant Rowan and co-conspirator Morris were aware that the District Director's letter to Hobbs, which upheld the exclusion from the excise tax base of an installation charge included in the retail price, conflicted with the advice that Mr. Dodge of the Internal Revenue Service had given Cushwa about Fruehauf's handling charge. Revenue Agent Rochefort did not represent to appellant Fruehauf that the exclusion of a handling charge from appellant Fruehauf's excise tax base was proper.

In November, 1959, the Hobbs method was instituted through the issuance of new Fruehauf sales manuals. The implementation of the Hobbs method resulted in Fruehauf maintaining a double set of equipment invoices with respect to each trailer sold to a distributor. One copy showed figures in accord with the information sent to the distributors, the list price less a distributor discount, which was the method of computation consistent with representations made by Fruehauf to the Internal Revenue Service concerning sales to distributors. The other copy showed an $83 reduction in the list price of the trailer prior to the application of the distributor discount, which was in accord with the figures used by Fruehauf in recording the transaction for its own books and which reflected the exclusion of the handling charge from the excise tax base.

7. Further Increases in the Supplemental Charges and the Distributor Discount.

Along with the issuance of new Fruehauf sales manuals in November, 1959, the distributor discount was increased from 42% off the list price to 45%, and total supplemental charges increased from 3.75% of the list price to 5%. The supplemental billings maintained the same designations as before the increase; interest was increased from 4½% to 6% per annum on the open receivables account balance due from each distributor. Co-conspirator Chawner recommended this increase in supplemental billings, and appellant Rowan approved the increase, even though there were no studies made by appellant Fruehauf to support the increase in supplemental charges. At this time, distributors again were cautioned to record supplemental charges as expenses rather than as a part of trailer cost.

Effective September 1, 1961, appellant Fruehauf, with the specific approval of appellant Grace, again increased the discount to distributors from 45% off the list price to 50% off, plus $50 per unit. With this rate of discount, Fruehauf Corporation was selling certain models of its trailers to distributors virtually at cost; in developing list prices, appellant Fruehauf's rule of thumb was that cost was 50% of the list price.

This September, 1961, increase in the distributor discount was motivated by excise tax savings considerations. In a memorandum dated February 13, 1962, appellant Grace advised R. N. Biggers, the vice-president of Fruehauf Corporation in charge of the Hobbs Division, that the reason for the "fooling around we have done with Federal Excise Tax" was that "Fruehauf will pick up some $20,000 per month by a 50 percent discount with a 5 percent charge-back than they would if they had stayed at 45 percent and charged back 5 percent."

8. The Warranty Allowance.

The September, 1961, increase in the distributor discount to 50% off the list price included the warranty allowance that prior to September, 1961, had been indicated specifically on the face of each distributor equipment invoice. The change was quite significant.

At the December 13, 1956, meeting in Washington, D.C., Cushwa, Engel, appellant Rowan, and co-conspirator Morris discussed not only the proposed supplemental charge plan but also the effect on the excise tax base of a $40 warranty allowance given to Fruehauf's distributors. In 1956, appellant Fruehauf Corporation had reduced the wholesale price by $40, with the understanding that the distributors would bear the expense of performance under the routine warranty, but in accordance with advice received from the attorney Cushwa and the Internal Revenue Service, had been adding back this warranty allowance into the excise tax base for retail sales. At the Washington, D.C. meeting, Cushwa again advised appellant Rowan and co-conspirator Morris that the warranty allowance would still have to be included in the excise tax base in computing excise taxes on retail sales.

After that meeting, Cushwa sought to verify his advice by conferring with Mr. Dodge of the Internal Revenue Service and by requesting the Internal Revenue Service to issue a ruling on the question. Both the advice of Mr. Dodge and the formal ruling of the Internal Revenue Service indicated that a warranty charge to retail purchasers must be included in the excise tax base in computing the tax on retail sales, despite a warranty allowance given at wholesale. As to distributor sales, the Internal Revenue Service refused to take a position in the absence of the copies of the agreements in which the distributors agreed

to assume the warranty costs. Until September, 1961, the procedure was thus to treat retail and wholesale sales differently in terms of the excise tax treatment of the warranty. The warranty allowance to distributors was excluded from the excise tax base on distributor sales, but it was added back to the excise tax base on retail sales.

Effective September 1, 1961, the price to distributors was decreased from 45% off the list price to 50% off plus $50 per unit. Concealed in the increased discount at wholesale was the warranty allowance that had previously appeared as a separate deduction on each distributor equipment invoice. The warranty charge to retail purchasers was thus effectively eliminated from the excise tax base attributable to retail sales, contrary to the ruling of the Internal Revenue Service.

Co-conspirator Morris, in an October 25, 1961, letter to Cushwa falsely stated that after September 1, 1961, there was "no allowance to the distributor for warranty expense." In fact, there was still a warranty allowance. It was concealed in the additional discount so that the warranty allowance could be excluded from the excise tax base for retail sales as well as wholesale sales. Appellant Grace told one distributor that appellant Fruehauf "changed the name from warranty to something else in order to help out a little on the tax problem."

9. Appellant Fruehauf's Make-Ready Allowance to Distributors.

In his October 25, 1961, letter to Cushwa, con-conspirator Morris wrote that appellant Fruehauf Corporation was extending a $50 make-ready allowance to its distributors to cover the expenses of adjusting the customer's coupler, of

any necessary rework, and of any delivery preparation, expenses which were being incurred in connection with the sale of each trailer. Beginning January 1, 1962, the $50 allowance to distributors was recovered by increasing the supplemental charge to distributors by $50 per unit. The make-ready charge was thus shifted from the wholesale price to the supplemental billings. This additional $50 per unit supplemental charge was not separately designated on the monthly supplemental charge invoices.

Before this procedure of extending the make-ready allowance and recouping that allowance in the supplemental billings was instituted, co-conspirator Morris expressed a reluctance to appellant Rowan as to putting into effect the procedure. Co-conspirator Morris did not believe the $50 exclusion from the distributors' price, with subsequent recovery of the allowance through supplemental charges, to be proper. When at one time co-conspirator Morris and appellant Rowan were discussing the matter, appellant Rowan received a telephone call from appellant Grace, who asked to speak to co-conspirator Morris. Appellant Grace told co-conspirator Morris that he wanted to hear co-conspirator Morris tell appellant Rowan to go ahead with the make-ready allowance from price and recovery in supplemental charges. Despite the misgivings that co-conspirator Morris had concerning this matter, Morris, holding the telephone in a way that would carry his voice to appellant Grace, told appellant Rowan to go ahead with the make-ready charge.

In February and March, 1962, co-conspirator Chawner told distributors that the $50 per unit increase in supplemental charges for handling was strictly fictional for

the purpose of saving $5 in excise tax.[13] Despite the obvious addition of a $50 per unit charge on the supplemental billings, appellant Rowan told attorney Milton J. Mehl that there had been no change in the procedure or amount of supplemental billings.

10. The Supplemental Charges For the Southern Railway Trailers.

In March and April of 1964, distributor Warner-Fruehauf purchased a number of trailers from appellant Fruehauf and then leased those trailers to Southern Railway. At Warner-Fruehauf's request, appellant Fruehauf cancelled the supplemental charges for "printed matter" and "management consulting" that had been issued at the time of the sale of the trailers to Warner-Fruehauf. New charge invoices were prepared for the same amount as had been billed under the designations "printed matter" and "management consulting," but the charges were for special engineering research, stress analysis, and design cost work allegedly performed from January 1, 1964, through June 30, 1964. No records were maintained by appellant Fruehauf, however, as to these services described as special engineering research, stress analysis, and design cost.

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[13] District Court Finding No. 96 states:

> In February and March 1962 co-conspirator Chawner advised distributors that the $50 per unit increase in the supplemental charges for handling was strictly fictional for the purpose of saving $5 in excise tax (GX 115-118).

Appellants argue that co-conspirator Chawner never advised distributors that the increase in the supplemental charges was fictional and that a reading of Government Exhibits 115 through 118 demonstrates the error. Those exhibits, however, clearly speak for themselves and fully support the district judge's finding.

11. Supplemental Charges Come Under Internal Revenue Service Scrutiny; Fruehauf's Response.

By 1964, when Internal Revenue Service agents were questioning appellant Fruehauf's supplemental charge plan, the amounts charged in the supplemental billings had really grown to excessive proportions. In September, 1964, the supplemental charges to Hobbs Trailer Company were in excess of $366 per unit for printed matter and in excess of $733 per unit for management consulting fees. In October, 1964, Hobbs was charged $473 per unit for printed matter and $946 per unit for management consulting fees. (Government Exhibit 22.) These figures for September and October were within a few cents of equalling 5% of the trailer price.

On September 18, 1964, co-conspirator Morris told Revenue Agent Kiefer that the denomination of billings for services to distributors made no difference to the Fruehauf Corporation and that the supplemental charge for interest was "not really interest but an amount billed to show the distributor what he could owe as interest." On October 16, 1964, co-conspirator Morris admitted to Revenue Agent Kiefer that there were no records to substantiate the supplemental charges.

On December 29, 1964, co-conspirator Morris wrote a memorandum to appellant Rowan, recommending that Fruehauf Corporation consider the revision of its method of computing the federal excise tax on its sales. In the memorandum, co-conspirator Morris first reviewed the structure of the supplemental charge plan, noting that the supplemental billings were at 5% of the list price, and then indicated that federal agents would be contending that the supplemental charges were components of the wholesale price and hence includable in the excise tax

base. Morris stated that most of the items billed as supplemental charges were "doubtful at best" and that "upon negotiation we will be fortunate . . . to sustain our position on two of the five (percentage) points." Morris advised that the alternatives were: (1) that the supplemental billings be eliminated, (2) that the supplemental billings be based on specific charges rendered (which according to the original advice of attorney Cushwa was necessary to counsel's approval of the plan), (3) that the supplemental billings be included in the wholesale price, and (4) that computation of the excise tax be done according to the "retail method."[14]

Effective January 1, 1965, the Fruehauf supplemental charge plan designations were changed from "printed matter," "management consulting," and "interest" to "finance," "teletype," and "interest." These new charges were posted on appellant Fruehauf Corporation's books, like the old charges, as recovery of costs applicable to new trailers. The supplemental charge for "teletype" was an allocation of Fruehauf's total expenses of operating its teletype system, over and above that amount already recouped through monthly teletype "rental" charges to each distributor. The supplemental charge for "finance" was a proration of the total operating expenses of the Fruehauf Finance Company, a separately incorporated but wholly owned subsidiary of appellant Fruehauf Corporation. The supplemental "interest" charge was equal to 9% per annum on the month-end balances of each distributor's equipment account and parts and services account. These billing designations continued in effect through February 8, 1966, the date of the filing of the quarterly

[14] Government Exhibit 155.

manufacturers' excise tax returns for the fourth calendar quarter of 1965, the last overt act listed in the indictment.

In recorded testimony taken in 1967 by the Internal Revenue Service, appellant Rowan admitted that the cost of rendering services to appellant Fruehauf's distributors was an unsegregated portion of the cost of operating several of appellant Fruehauf's departments and was considered by appellant Fruehauf in developing its selling prices and profit margins. At trial, co-conspirator Morris testified that he had no knowledge of any studies that justified the increases in and modifications of the supplemental billings.

The Tire Tax Credit Scheme

Tire manufacturers publish price lists, known as OEM (original equipment-manufacturer) price lists. During the period of the conspiracy charged in the indictment, appellant Fruehauf Corporation, as a large volume purchaser of tires, was able to negotiate contracts for the purchase of tires at prices substantially below the OEM price level. Appellant Fruehauf executives referred to such prices as "confidential" prices. Appellant Grace, on behalf of appellant Fruehauf, participated in the contract negotiations with tire companies, and he had the final authority in approving the contracts.

At the request of appellant Fruehauf, the tire manufacturers billed Fruehauf on the basis of OEM prices, rather than on the basis of the negotiated "confidential" prices. The difference between the invoice price, stated at the OEM level, and the lower "confidential" price was rebated to appellant Fruehauf by means of monthly checks or credit memoranda. Fruehauf executives, including ap-

pellants Grace and Rowan, were aware of the amount of the rebate to which Fruehauf was entitled before the actual receipt of the checks or credit memoranda from the tire manufacturer. Nevertheless, the tire tax credit claimed against Fruehauf's excise tax liability was computed from schedules prepared by co-conspirator Morris based, not on the confidential prices, but on the OEM prices without regard to the rebates.[15]

In March, 1958, co-conspirator Morris and appellant Rowan discussed Fruehauf's computation of the tire tax credit. Co-conspirator Morris initially took the position that the credits should be based on the lower contract price, taking into account the rebates; however, after co-conspirator Morris and appellant Rowan together studied the statute and the regulations, they concluded that the "purchase price" of the tires, on which the tax credit was to be computed, could be construed as the invoice price, regardless of whether rebates were received. Co-conspirator Morris and appellant Rowan did not seek the advice of Cushwa or in-house counsel to verify their conclusion. Rather, co-conspirator Morris made telephone calls to various automobile companies to determine on what basis they computed tire tax credits.

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[15] District Court Finding No. 104 states:

> The "tire tax credit" claimed against Fruehauf's excise tax liability was computed from schedules prepared by co-conspirator Morris based on the O.E.M. prices, without regard to rebates received (Tr., V. 9, 1017, and V. 24, p. 2800; GX 43).

Appellants complain that the testimony of co-conspirator Morris indicates that a Virginia Ruesman prepared the schedules to which the district judge referred in his finding and that Virginia Ruesman was not instructed by co-conspirator Morris concerning the schedules. Appellants' reference to a subordinate of co-conspirator Morris is disingenuous. Moreover, the testimony of co-conspirator Morris and Revenue Agent Kiefer clearly indicates that Fruehauf's Tax Department, headed by co-conspirator Morris, prepared the schedules.

In 1964, when appellant Fruehauf's method of claiming tire tax credits came under the scrutiny of the Internal Revenue Service, co-conspirator Morris and appellant Rowan were less than forthright about their March, 1958, meeting concerning the tire tax credit. On November 23, 1964, appellant Rowan falsely represented to Revenue Agent Kiefer that the tire tax credit was computed on the OEM price, rather than on the negotiated "confidential" price, as the result of oversight.[16] On August 4, 1965, co-conspirator Morris falsely represented to Revenue Agent Kiefer that he had not been aware until the end of 1964 that appellant Fruehauf received rebates on tire purchases.

Through December 31, 1964, appellant Fruehauf Corporation claimed tire tax credits based on the OEM tire prices. Effective January 1, 1965, however, appellant Fruehauf Corporation did change its practice of claiming tire tax credits so that the credit would be based on the negotiated "confidential" price rather than the invoiced OEM price.

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[16] District Court Finding No. 115 states:

> On November 23, 1964 Mr. Rowan stated to Revenue Agent Keifer that the tire tax credit was computed on the O.E.M. price rather than the negotiated price as the result of an oversight (Tr., V. 24, pp. 2793-2794).

Appellants contend that a review of the evidence would show that appellant Rowan never made the statement attributed to him in the finding. In the testimony of Revenue Agent Kiefer, however, Kiefer testified that he asked appellant Rowan why he had not advised co-conspirator Morris and his Tax Department concerning the tire rebates. At the time, co-conspirator Morris was claiming ignorance about the rebates. Appellant Rowan told Revenue Agent Kiefer that it must have been overlooked.

The District Judge's Final Findings

After reviewing this evidence, the district judge determined that appellant Fruehauf Corporation, through the use of two schemes that utilized deceptive invoicing procedures, had evaded a substantial part of its excise tax liability during the period beginning with the filing of the manufacturers excise tax return for the final quarter of 1956 and ending with the filing of the manufacturers' excise tax return for the final quarter of 1965. First, the supplemental charges were not properly excluded from the excise tax base in the computations for the excise tax returns because (1) the charge for interest was not really for interest, (2) the charge for printed matter was a continuation of the charge for national advertising and hence includable in the price of the trailer, (3) the charge for management consulting fees was required to be included in the price of the trailer, (4) the 1965 supplemental charges for teletype and finance were part of appellant Fruehauf's costs of doing business and thus required to be included in the taxable price of the trailer, (5) the warranty allowance was not excludable from the price of the trailer and hence the excise tax base had to reflect a warranty charge, and (6) the additional $50 per unit allowance to distributors, which was given effective January 1, 1962, and which was recouped in the supplemental billings, was a fictitious item, instituted solely for the purpose of evading excise taxes. Second, appellant Fruehauf overstated its tire tax credits in the period from October 1, 1956, through December 31, 1964, thereby understating its excise tax liability, because such credits were claimed on the basis of the invoice prices, which stated the prices at OEM levels, rather than on the lower true purchase price that took rebates into account.

The district judge further determined that the deceptive invoicing procedures were instituted and utilized to reduce

the excise tax base and to increase the amount of excise tax credits by the willful and unlawful conspiracy of appellants Fruehauf Corporation, Grace, and Rowan and unindicted co-conspirators Morris and Chawner, a conspiracy that commenced no later than December 12, 1956, and that extended through February 8, 1966. Appellants Fruehauf Corporation, Grace, and Rowan were thus found guilty of conspiring, in violation of 18 U.S.C. § 371, (1) to defraud the United States by impeding, impairing, obstructing, and defeating the lawful governmental functions of the Internal Revenue Service in the assessment and collection of federal manufacturers excise taxes, (2) to attempt to evade and defeat, contrary to 26 U.S.C. § 7201, the payment of federal excise taxes due and owing to the United States by Fruehauf Corporation for the period from October 1, 1956, through December 31, 1965, and (3) to aid or assist in the preparation and presentation, contrary to 26 U.S.C. § 7206, of materially false and fraudulent excise tax returns for the Fruehauf Corporation for all calendar quarters in the period from October 1, 1956, through December 31, 1965. The district judge also found that the quarterly manufacturers excise tax returns for the fourth calendar quarter of 1964 and the four calendar quarters of 1965 in particular had substantially understated the excise tax liability of appellant Fruehauf.

After the entry of the district judge's findings of fact, appellants moved for a new trial. The district judge issued an opinion in which he denied appellants' motion. Judgment was then entered against appellants. Appellants now appeal to this Court.

II

In urging reversal of their convictions, appellants first argue that appellee United States failed to prove the offense charged in the indictment. According to appellants,

the conspiracy of which the district judge found appellants guilty was altogether different from the conspiracy alleged in the indictment.[17] The indictment charged that distributors were billed by appellant Fruehauf for services that were never rendered and that the supplemental billings containing the charges were concealed from the Internal Revenue Service.[18] The district judge found that, as had been charged in the indictment, appellants had employed deceptive invoicing procedures to conceal the supplemental

[17] Treated in Part III will be the issues raised by appellants and appellee United States as to the tax credit, the relevancy of certain regulations, and the evidence of the conspiracy, issues which were briefed in connection with the variance argument but which can be better handled in Part III.

[18] Indictment Subparts (10), (11), and (12) state:

(10) that defendant ROWAN and co-conspirator Morris sought approval of independent attorneys and accountants to lower the wholesale price tax base by representing to them that the defendant FRUEHAUF CORPORATION performed "extra services" for wholesalers which it did not perform for other FRUEHAUF customers, and that the charges for these "extra services" were included in the invoiced prices to the wholesalers, thus allegedly overstating the wholesale tax price base; whereas it was well known that FRUEHAUF never had nor did it intend to furnish any of these "extra services" to the wholesalers.

THE GRAND JURY CHARGES that, in addition, it was a part of the conspiracy:

(11) that the invoiced price to the wholesalers would be reduced by an arbitrary percentage to establish a false lower Excise Tax base, and that a substantial amount would then be recouped in the form of supplemental billings for these non-existent services.

(12) that elaborate accounting and invoicing procedures were set up by ROWAN, Chawner and Morris for the benefit of defendant FRUEHAUF CORPORATION wherein the charges for these false services were concealed in such a manner as to escape detection upon an Internal Revenue Service audit.

. . .

billings, but in apparent contrast to the indictment, found that appellants had billed distributors under the supplemental charge plan for amounts that should have been included in the wholesale price and hence in the excise tax base. Appellants point out that the conspiracy found by the district judge, unlike that alleged in the indictment, did not involve fictitious charges for services that were never rendered.

The law upon which appellants premise this argument is the law of amendment and variance, which the Supreme Court laid out in three decisions. In *Ex Parte Bain*, 121 U.S. 1 (1887), the Supreme Court held that the fifth amendment grand jury requirement forbade the United States from formally amending an indictment as to its charging terms and that any such formal amendments constituted reversible error per se. In *Berger* v. *United States*, 295 U.S. 78 (1935), the Supreme Court was confronted with a variance between the particulars alleged in the indictment and the proof at trial; after noting that the interests of fair notice and freedom from double jeopardy were involved in such cases, the Court held that a variance would be harmless error if not prejudicial to the defendant. In *Stirone* v. *United States*, 361 U.S. 212 (1960), the Supreme Court held that certain variances, those created when the proof presented at trial was of a different or an additional crime than the one alleged in the indictment, amounted to "constructive amendments" and were subject to the reversible per se rule of formal amendments.

This Court and other courts of appeal have thus distinguished between amendments, formal and constructive, which are considered reversible per se, and variances, which are reversible error only if prejudicial to the defendant. *Watson* v. *Jago*, 558 F.2d 330 (6th Cir. 1977); *United States* v. *DeCavalcante*, 430 F.2d 1264 (3d Cir. 1971); *United States* v. *Silverman*, 430 F.2d 106 (2d Cir. 1970); *Gaither* v. *United States*, 413 F.2d 1061 (D.C. Cir.

1969). Also, this Court and other courts of appeal have recognized the following distinction between amendments and variances.

> An *amendment* of the indictment occurs when the charging terms of the indictment are altered, either literally or in effect, by prosecutor or court after the grand jury has last passed upon them. A *variance* occurs when the charging terms of the indictment are left unaltered, but the evidence offered at trial proves facts materially different from those alleged in the indictment.

Watson v. *Jago, supra,* 558 F.2d at 334; *Gaither* v. *United States, supra,* 413 F.2d at 1071; *United States* v. *Pelose,* 538 F.2d 41, 45 n.8 (2d Cir. 1976); *United States* v. *Somers,* 496 F.2d 723, 743 n.38 (3d Cir.), *cert. denied,* 419 U.S. 832 (1974); *United States* v. *Bursten,* 453 F.2d 605, 607 (5th Cir. 1971), *cert. denied,* 409 U.S. 843 (1972).

In the present case, we are not confronted with a formal amendment of the indictment. There has been no literal alteration of the indictment, and appellants do not contend otherwise.

Nor do we have a constructive amendment. The present case is distinguishable from *Stirone* v. *United States, supra,* 361 U.S. 212, and from a constructive amendment case in this Circuit, *Watson* v. *Jago, supra,* 558 F.2d 330. In *Stirone* v. *United States, supra,* the defendant was charged with a Hobbs Act violation for interfering with sand shipments into Pennsylvania, but the defendant's conviction was based not only on the Hobbs Act violation charged in the indictment but also on another Hobbs Act violation, the interference of steel shipments moving from Pennsylvania into interstate commerce. In *Watson* v. *Jago, supra,* a state defendant was charged with premeditated murder, but at trial the defendant was tried for both premeditated murder and felony-murder, which under Ohio law were

separate offenses.[19] *See Cole* v. *Arkansas,* 333 U.S. 196 (1948); *United States* v. *Swarthout,* 420 F.2d 831 (6th Cir. 1970). By contrast, in the present case, appellants were convicted of conspiracy to defraud the United States, to evade payment of excise taxes, and to aid or assist in the preparation and presentation of materially false excise tax returns, the crime which was charged in the indictment;[20]

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[19] *Watson* v. *Jago,* 558 F.2d 330 (6th Cir. 1977), was before this Court on appeal of the denial by a federal district court of the defendant's petition for a writ of habeas corpus. We held that the defendant was entitled to the issuance of the writ, conditioned on the State's right to retry the defendant, because as a consequence of the constructive amendment to the indictment, the defendant was deprived of his right to fair notice of the criminal charges to be brought against him, which was guaranteed to him by the Fourteenth Amendment.

[20] Indictment Subparts (1), (2), and (3) state:

Vio: Section 371, Title 18, United States Code (Conspiracy)
THE GRAND JURY CHARGES:

COUNT ONE

That on or about October 1, 1956, the exact date being unknown to the Grand Jury, and continuously thereafter up to and including February 8, 1966, in the Eastern Disctrict of Michigan and in other judicial districts of the United States, the FRUEHAUF CORPORATION (known prior to May 2, 1963, as the Fruehauf Trailer Company), and WILLIAM E. GRACE and ROBERT ROWAN, defendants, and Robert M. Chawner (now deceased), and Kenneth A. Morris, co-conspirators but not defendants, wilfully and unlawfully conspired with each other, and with other persons, unknown to the Grand Jury, to:

(1) defraud the United States by impeding, impairing, obstructing and defeating the lawful governmental functions of the Internal Revenue Service (IRS) of the Treasury Department of the United States in the ascertainment, computation, assessment, and collection of $12,344,587.31 in Federal Manufacturer's Excise Taxes;

(footnote continued)

the conviction was based on the supplemental billing system and inflated tire tax credits, particulars of the crime also alleged in the indictment.[21] Appellants were not confronted

(footnote continued)

(2) attempt to evade and defeat (contrary to Section 7201, Title 26, United States Code, the payment of $12,344,587.31 in Federal Excise Taxes to be due and owing and due and owing to the United States by the FRUEHAUF CORPORATION for the period October 1, 1956, through December 31, 1965;

(3) aid or assist in, and procure, counsel and advise the preparation and presentation (in violation of Section 7206(2), Title 26, United States Code), of materially false and fraudulent Excise Tax Returns (IRS Form 720) for the defendant FRUEHAUF CORPORATION for all calendar quarter years beginning October 1, 1956, and ending December 31, 1965, the returns understating the amount of Excise Tax payable by FRUEHAUF CORPORATION totaling $12,344,587.31.

[21] *See* footnote 18 for the indictment particulars with respect to the supplemental charge plan. Indictment Subparts (13) and (14) alleged the particulars concerning the excessive tire tax credits.

(13) that on behalf of defendant FRUEHAUF CORPORATION, defendant WILLIAM E. GRACE and other FRUEHAUF CORPORATION employees and the agents negotiated with various tire manufacturers for a precise and confidential contract price for tires used on FRUEHAUF products, but that these tire manufacturers were required by defendant GRACE to invoice FRUEHAUF CORPORATION at higher original equipment manufacturer (O.E.M.) prices followed up with a cash rebate from the tire manufacturer to FRUEHAUF CORPORATION for the difference between the higher O.E.M. invoiced price and the actual lower confidential contract price;

(14) that defendant FRUEHAUF CORPORATION, acting through its officers; defendants GRACE and ROWAN, and co-conspirator Morris, would knowingly and wilfully claim a Manufacturer's Excise Tax credit based upon the higher O.E.M. invoiced price rather than the lower confidential contract price, thus substantially overstating the credit and substantially understating the Manufacturer's Excise liability owed and owing by FRUEHAUF CORPORATION to the United States.

with a prosecution for an additional or different crime. Appellants could plead double jeopardy to another conspiracy prosecution for evasion of taxes based on the facts of the supplemental billing system and inflated tire tax credits. Contained in the indictment was the information required to be there to give appellants fair notice and to insure that the indictment formed the basis of the convictions. *See Watson* v. *Jago, supra,* 558 F.2d at 339 and n.7; *Russell* v. *United States,* 369 U.S. 749, 769-70 (1962).

Appellants' argument must therefore rest upon a variance between the particulars alleged in the indictment and the proof at trial. The considerations governing variances have been stated before by this Court.

> A variance is not to be regarded as material where it is not of a character which could have misled the defendant at the trial, Berger v. United States, 295 U.S. 78, 82, 55 S.Ct. 629, 79 L.Ed. 1314; or where it involves no element of surprise prejudicial to the efforts of the defendant to prepare his defense, United States v. Ragen, 314 U.S. 513, 526, 62 S.Ct. 374, 86 L.Ed. 383, rehearing denied, 315 U.S. 826, 62 S.Ct. 620, 86 L.Ed. 1222; or where it does not affect substantial rights. Rule 52(a), F.R. of Crim.P.; cf. United States v. Haskins, 345 F.2d 111, 114 (C.A. 6). "Whether or not a variance is prejudicial is a judgment that must be made on the facts of each case." United States v. Russano, 257 F.2d 712, 715 (C.A.2).

United States v. *Mills,* 366 F.2d 512, 514 (6th Cir. 1966); *United States* v. *Goble,* 512 F.2d 458, 466 (6th Cir.), *cert. denied sub nom. Shad* v. *United States,* 423 U.S. 914 (1975). *See United States* v. *Crowder,* 346 F.2d 1, 3 (6th Cir. 1964), *cert. denied,* 382 U.S. 909 (1965).

In urging that appellants' convictions be affirmed, appellee United States denies that there was a variance. The United States takes the position that the indictment

fairly embraced four theories that the Government contends that the proof at trial supported: (1) that no "extra" services were rendered to distributors that were not rendered to retail purchasers; (2) that the supplemental billings were not for any such "extra" services that may have been rendered; (3) that any "extra" services rendered did not remotely approach in value the amounts billed as supplemental charges; and (4) that the billings for the "extra" services were required to be included in the taxable price of the trailers that appellant Fruehauf sold (the "condition of sale" theory).

Under the authority of *Ragen* v. *United States,* 314 U.S. 513 (1942), the first three of these theories were fairly embraced in the indictment. The appellants' argument — that because the indictment charges "no services" the Government must prove that no services were rendered — was rejected by the Supreme Court in *Ragen.* In that case, the Supreme Court reviewed a conviction for conspiracy to evade corporate income taxes. The alleged conspiracy involved the deduction from reported corporate taxable income disbursements to corporate shareholders labelled as "commissions." In a manner similar to the indictment in the present case, the *Ragen* indictment charged that "no services" were rendered to support the commissions. At trial, the judge instructed the jury with a charge calling for a determination of whether the "commissions" were intentionally made to include amounts that should have been treated as dividends (which would assume that some undefined amount of services could have been rendered). Like the appellants in the present case, the *Ragen* respondents made a variance argument. The Supreme Court held that there was not a fatal variance.

> The respondents also urge that there was a fatal variance between the indictment and the proof, in that the indictment alleges that the commission payments were actually dividends in their entirety, whereas the evidence indicates that some services were performed. The fifth count of the indictment does refer to "all of the moneys . . . paid . . . by virtue of the . . . so-called 'Employment Contracts'" as "in truth and in fact, distributions of profits and dividends." But the gravamen of the charge is distribution of dividends in the guise of commissions, and the respondents cannot fairly claim that they were not adequately apprised of the nature of the offense. Any variance which existed, at most a matter of the extent of the alleged tax evasion, involves no elements of surprise prejudicial to the respondents' efforts to prepare their defense.

Ragen v. *United States, supra,* 314 U.S. at 526.[22]

The *Ragen* decision is not authority, however, for dismissing the variance question as to the fourth Government

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[22] Appellants contend in their reply brief that *Ragen* v. *United States,* 314 U.S. 513 (1942), is irrelevant in the absence of a district court finding that the distributors were billed for services never received. The Supreme Court rejected this argument in *Ragen, supra,* 314 U.S. at 524-25.

> The respondents, however, raise a further objection going not to the propriety of such a submission as a matter of law, but to the insufficiency of the evidence upon which the jury could have found an answer to the question submitted. They contend that the record discloses that the recipients of commissions performed some services; that the record fails to show that the services disclosed were the only services rendered: that there was no direct testimony as to the total amount of services rendered or the reasonable value thereof; and that, therefore, the jury had no rational basis upon which to conclude that the sums deducted as "commissions" were more than a reasonable allowance for compensation for the services rendered. We must reject this contention.

theory, the "condition of sale" theory, and it is that theory about which appellants particularly complain.[23] Nevertheless, our analysis of applicable law leads us to conclude that there was not a fatal variance between the facts alleged in the indictment and the condition of sale theory.

The gist of Subpart (11) of the indictment is the allegation that appellants conspired to manipulate the wholesale price of trailers in order to establish a reduced excise tax base and to recapture the amounts otherwise lost by the lower price through the supplemental billings.

> THE GRAND JURY CHARGES that, in addition, it was a part of the conspiracy:
>
> (11) *that the invoiced price to the wholesalers would be reduced by an arbitrary percentage to establish a false lower Excise Tax base, and that a substantial amount would be recouped in the form of supplemental billings* for these non-existent services (emphasis supplied).

[23] It would be inaccurate to say, as appellants seem to do, that the district judge relied solely on the condition of sale theory. The district judge found that the 1962 $50 per unit make-ready allowance to distributors (recouped in the supplemental billings) was fictional. District Court Finding No. 132. The district judge found that the amounts charged as interest were not really for interest. District Court Finding No. 133. The district judge made findings concerning the Southern Railway and Indiana gross income tax incidents, in which the supplemental charges appeared patently fictional. District Court Findings Nos. 74-77, 109-12. In addition, it should be observed that the district judge, in finding that certain charges were required to be included in the taxable price of the trailers, was not therefore concluding that the charge was actually for the service or that the value of the service equalled the amount charged in the supplemental billing. *See* Part III of this opinion.

One method of manipulating the wholesale price would be the exclusion of charges required to be included in the wholesale price.

Furthermore, appellants cannot claim that they were misled or surprised when the United States included the condition of sale theory as one of the prosecution's theories. Appellants, after being served the indictment, filed a motion for a bill of particulars. In that motion, appellants requested the following information.

> (10)(b) State whether the government will contend at trial that none of the "services" referred to herein were rendered. If the answer to the preceding is in the negative, describe those "services" that the government will concede were in fact rendered.
>
> (c) State whether the government will contend at trial that even if the "services" referred to herein were rendered, the amounts billed for them are not legally excludable from the excise tax base applicable to wholesale sales.

Joint Appendix at 34. The Government's Response to appellants' motion properly informed appellants that they would be facing a number of prosecution theories, including the condition of sale theory.

> (10)(b) The Government will contend the Fruehauf Corporation rendered no excludable services to its wholesale distributors, nor will it concede that any services were rendered.
>
> (10)(c) The Government will contend that if any services were rendered, the charges therefore were not properly excludable from the excise tax base.

Joint Appendix at 50. Appellants read the indictment to include the possibility that the United States would contend that even if services were rendered to distributors, the charges were still required to be included in the wholesale price and hence in the excise tax base.

III

Appellants' second main argument on appeal is that the appellant Fruehauf excise tax returns were prepared according to applicable law. In appellants' view, the exclusion of the supplemental charges from the wholesale price (and hence the excise tax base) and the computation of the tire tax credits with invoice prices without regard to pre-arranged rebates was proper. Of course, the conclusion would follow that appellants would not be guilty of the criminal conspiracy charged in the indictment.

We believe, however, that it was clear that the supplemental billing plan did not operate in accordance with applicable law and that the computation of the tire tax credits based on the invoiced OEM price without regard to pre-arranged rebates was improper. Appellants did engage in the conspiracy charged in the indictment and did not innocently miscalculate the amount of taxes owed under a complex excise tax law.

The Supplemental Billings

1. The Exclusion of "Supplemental" Charges from the Excise Tax Base.

Appellants contend that charges for articles not listed in § 4061(a) of the Internal Revenue Code of 1954, 26 U.S.C. § 4061(a),[24] are not subject to the manufacturers excise tax. According to appellants, § 4061(a) imposes a tax on sales by manufacturers of certain articles, including truck trailer and semitrailer bodies and chassis, and not on services rendered contemporaneously with the sale. As support for this proposition, appellants attempt to compare this situation with that when a taxable article and a

[24] *See* footnote 4.

nontaxable article are sold by a manufacturer as a unit and the manufacturers excise tax applies to that portion of the sales price that is properly allocable to the taxable article. *Macey's Jewelry Corp.* v. *United States,* 387 F.2d 70 (5th Cir. 1967); Revenue Ruling 60-259, 1960-2 C.B. 318. Appellants add that § 4216(a) of the Internal Revenue Code of 1954, 26 U.S.C. § 4216(a), specifically excludes transportation, delivery, insurance, installation, or other charge.

Appellants do not accurately state the law. The price used by the computation of the excise tax in § 4061(a) is defined in § 4216(a),[25] and it is not strictly limited to manufacturing costs. Rather, the taxable price essentially excludes no expense incurred by the manufacturer in connection with the article taxable under § 4061(a) prior to the shipment of the article. Even packaging cost is included. *Fitch Co.* v. *United States,* 323 U.S. 582 (1945); *Waterman-Bic Pen Corp.* v. *United States,* 332 F.2d 711 (2d Cir. 1964); *United States* v. *Stowe-Woodward, Inc.,* 306 F.2d 678 (1st Cir. 1962), *cert. denied,* 371 U.S. 949 (1963). *See Hunt Foods and Industries, Inc.* v. *United States,* 436 F.2d 443 (Ct. Cl. 1971). In addition, § 4216(a) by its terms does not permit the exclusion of a transportation, delivery, insurance, installation, or other charge unless such a charge is not incident to placing the article in condition ready for shipment and unless the amounts so excluded are established to the satisfaction of the Secretary of the Treasury.

[25] *See* footnote 5. The term "other charge" in the statute was interpreted by the Supreme Court in *Fitch Co.* v. *United States,* 323 U.S. 582 (1945), to mean charges similar in nature to transportation, delivery, insurance, or installation charges.

Appellants cite *Fitch Co.* v. *United States,* 323 U.S. 582 (1945), as authority for their position that services are not intended to be covered by the manufacturers excise tax, but appellants misread the case. In *Fitch,* the Supreme Court held that advertising and selling expenses were to be included in the taxable price of the manufacturer's product because all such pre-shipment charges were to be included in the excise tax base.

> Congress sought in the Revenue Act of 1932 to use the manufacturer's or wholesaler's selling price, rather than the retail price, as the measure of the excise taxes imposed by § 603. 75 Cong. Rec. 11383, 11657. Section 619(a) was designed to lay down specific rules for determining this selling price, especially in relation to costs incurred after the article itself had been manufactured. It provides for the use of the manufacturer's or producer's f.o.b. price at the factory or place of production. In essence, all manufacturing and other charges incurred prior to the actual shipment of an article and reflected separately or otherwise in the f.o.b. wholesale price are to be included in the sale price underlying the tax, while all charges incurred subsequent thereto are to be excluded. Hence any additional charge which a purchaser would not be required to pay if he accepted delivery of the article at the factory or place of production may be so excluded. See H. Rep. No. 708 (72d Cong., 1st Sess.) p. 37; S. Rep. No. 665, Part 3 (72d Cong., 1st Sess.) p. 3; H. Conf. Rep. No. 1492 (72d Cong., 1st Sess.) p. 22.
>
> Advertising and selling expenses incurred by a manufacturer such as petitioner clearly fall within the class of charges which Congress intended to be included in the tax base. Regardless of whether we consider such expenses technically as manufacturing costs, it is obvious that they are incurred prior to the actual shipment of articles to wholesale purchasers

> and that they enter into the composition of the wholesale selling price. Even if the purchaser accepts delivery at the factory, he pays for the advertising and selling expenses. Thus they must be included in the taxable sales price.

323 U.S. at 584-85. The same provisions that the Supreme Court interpreted were reinacted in full in the Internal Revenue Code of 1954, and the *Fitch* case is the governing Supreme Court authority in interpreting § 4216(a). *United States* v. *Stowe-Woodward, supra,* 306 F.2d 678; *Hunt Foods and Industries, Inc.* v. *United States, supra,* 436 F.2d 443; *General Motors* v. *United States,* 339 F.2d 648, 652 (Ct. Cl. 1964).

The cases of *United States* v. *Stowe-Woodward, Inc., supra,* 306 F.2d 678, and *Hunt Foods and Industries, Inc.* v. *United States, supra,* 436 F.2d 443, illustrate the *Fitch* principle. In both cases, it was held that presale transportation charges, which fell within the literal terms of the language in § 4216(a) conditionally providing for the exclusion of transportation and delivery charges, were required to be included in the taxable price. The courts in both cases cited *Ayer Co.* v. *United States,* 38 F. Supp. 284, 289 (Ct. Cl. 1941), for the "added value" test and found that the transportation charge added to the attractiveness of the manufacturers product and therefore put value into the taxable articles.

This review of the relevant judicial authority on § 4216 (a) should make clear that the Government's prosecution of appellants did not rest on administrative interpretation, which appellants vigorously argued and which appellee United States just as strongly denied. According to ap-

pellants, the regulations supporting the prosecution, Regulations 316[26] and 330,[27] were repealed, Regulations 316 on October 8, 1958, and Regulations 330 on February 7, 1963. Appellants argue that in view of the doubtful efficacy of these regulations, they could not have formed the necessary intent to violate the provisions of the regulations. According to appellee United States, these regulations were never repealed but were not necessary to the legal underpinning of the conspiracy case.

Because we agree with the United States that the prosecution against appellants could proceed without the regulations in question, we do not reach the question as to whether they were repealed. *See United States* v. *Stowe-Woodward, Inc., supra,* 301 F.2d at 682. Examination of the exclusion of the particular supplemental charges will further demonstrate how the Government's prosecution did not rest upon the regulations. We do observe here, however, that the importance of the regulations lies in the fact that they embody an administrative interpretation of

[26] Regulation § 316.12 provides:

> Exclusion of charges for transportation, delivery, etc., generally.—Charges for transportation, delivery, insurance, installation, and other charges actually incurred in connection with the delivery of an article to a purchaser pursuant to a bona fide sale, are to be excluded in computing the tax.
>
> No other additional charge may be excluded in computing the tax unless it can be shown by adequate records to the satisfaction of the Commissioner that such charge properly is not to be included as a manufacturing or selling expense, or is in no way incidental to placing the article in condition packed ready for shipment.

[27] For Regulation § 330.1-1(b), *see* Part I of this opinion.

the statute consistent with the judicial interpretation,[28] and appellants concede that the regulations were in effect during a portion of the period of the alleged conspiracy.

2. The Exclusion of the Supplemental Interest Charges.

Appellants contend that a charge for interest is not includable in the taxable price of an article, citing *Macey's Jewelry Corp.* v. *United States,* 387 F.2d 70 (5th Cir. 1967), and thus conclude that the amounts charged as interest in the supplemenal billings were properly excludable from the taxable price of the trailers. Appellee United States does not contest the statement that a bona fide charge for interest is excludable from the taxable price. The United States does dispute appellant's broad reading of the *Macey's Jewelry* case and argues further that the district court was not clearly erroneous in finding that the supplemental interest charges were not really interest charges.

[28] Appellants deny that Regulations 316 and 330 constituted an administrative recognition of the *Fitch* case, but appellants' arguments are quite unimpressive on this point. First, appellants quote language in a reversed district court case, *Stowe-Woodward, Inc.* v. *United States,* 200 F.Supp. 855 (D.Mass. 1961), *rev'd,* 306 F.2d 678 (1st Cir. 1962), *cert. denied,* 371 U.S. 949 (1963). The quoted language is supposed to inform us that the Government did not in the *Stowe-Woodward* case recognize *Fitch* as creating a flat rule including all preshipment expenses in the taxable price, but all that the quoted language indicates is that the Government would not rule out including in the taxable price certain postshipment but presale expenses. The Government won on appeal in the First Circuit, which relied upon *Fitch* in deciding the case. Second, appellants reproduce one Internal Revenue Service memorandum concerning T.D. 6340 and the exclusion of cooperative advertising charges from the excise tax base. Appellants note that *Fitch* is not quoted in the memorandum. We believe, however, that this memorandum is not much support for appellants' position.

We agree with the United States. In *Macey's Jewelry*, the Fifth Circuit held "that an extra charge for goods sold on credit may be a true finance charge not within the price for which the goods are sold." 387 F.2d at 71. In so holding, the court in *Macey's Jewelry* quoted, 387 F.2d at 72, the following passage from *Berman's Jewelry Store, Inc.* v. *United States*, 198 F.2d 675, 678 (4th Cir. 1952).

> There can be, of course, such a thing as a "finance charge" or "carrying charge" on installment sales and they are not unusual. And where such a charge is confined to and is truly representative of the added expense imposed upon the vendor by installment selling (as distinguished from cash sales) it is not to be included in the tax base. Such a charge may properly include lawful interest on the deferred portion of the purchase price, the cost of the bookkeeping necessary to keep the records of such sales, and any other expense directly attributable to the fact that payment is to be made in installments instead of cash.

It should be noted that the *Macey's Jewelry* and *Berman's Jewelry* decisions do not stand for the proposition that any interest charge is excludable. Both cases dealt with finance charges on credit sales. The Court in *Macey's Jewelry* reversed the trial court's grant of summary judgment in favor of the Government and ordered that the taxpayer company be given an opportunity to prove at trial that its finance charge was bona fide. In *Berman's Jewelry*, a finance charge was included in the taxable price.

In the present case, the district court found that the supplemental interest charge was not really for interest. When the supplemental charge plan was proposed, the interest charge was intended to cover the cost of equipment accounts receivable balance carried by appellant Fruehauf until the units were sold by distributors; however,

the evidence did not disclose the existence of a deferred or installment payment plan between appellant Fruehauf and its distributors. The sales were made on open account, and payment was not due until the expiration of the thirty or ninety day period stated on the invoice. The "interest" charge was computed by applying the prevailing interest rate to the distributor's month ending equipment account receivable balance, regardless of whether the account was current. Distributors were charged "interest" without regard to whether payment was due.

Macey's Jewelry is distinguishable in another regard. That decision could not justify tax evasion. As was stated in *Berman's Jewelry, supra*, 198 F.2d at 678:

> . . . [I]t is obvious that in fixing the amount which a customer is to pay on a credit sale a merchant cannot arbitrarily name any amount that he chooses as a "finance charge" or "carrying charge" and thereby exclude it from the tax base. This would open unlimited opportunities for evasion of tax.

In the present case, when the supplemental charge plan was instituted, amounts received by appellant Fruehauf in payment for the interest charges were posted to an interest income account. In August, 1957, this practice was changed because of the distortion to the corporate budget, and thereafter interest income was charged as reductions to the cost account applicable to new trailers, indicating that the interest charge lacked substance. Even more revealing, the interest charge was manipulated for the ends of the supplemental charge plan. In November, 1959, when the supplemental billings were increased from 3.5% to 5% of the list price, the interest charge was increased from 4½% to 6% per annum on the open equipment receivable account balance due from each distributor. In January, 1965, when two of the designations of the sup-

plemental billings were changed to "teletype" and "finance," the interest charge was increased to 9% per annum on the month-end balances of each distributor's equipment account and parts and services account. In September, 1964, co-conspirator Morris accurately admitted to a revenue agent that the supplemental charge for interest was not really for interest. The district court was thus not clearly erroneous in finding that the supplemental interest charge was not really an interest charge.

3. The Exclusion of Supplemental Charges for Advertising, Printed Matter, Management Consulting, and Teletype.

As with the supplemental interest charges, appellants contend that the supplemental charges for advertising, printed matter, and teletype were excludable from the taxable price. Appellants state that the Internal Revenue Service has authorized exclusions from the excise tax base for advertising charges (primarily for local advertising)[29] and for expenses incurred in helping distributors sell at retail, and it is true that at the time that the supplemental charge plan was approved by the attorney Cushwa and the accountant Engel, the Internal Revenue Service was issuing private letter rulings allowing for the exclusion from the excise tax base of charges for retailing expenses and (despite *Fitch*) for advertising. Appellants also state that four of their witnesses testified to the rendition of services charged to distributors.

A necessary assumption of appellants' argument is that the charges in the supplemental billings were actually for

[29] 26 U.S.C. § 4216(f), enacted to be effective January 1, 1961, provides for the exclusion of local advertising charges from the sale price definition in 26 U.S.C. § 4216(a).

whatever services that were rendered. The evidence shows otherwise. The supplemental billings were at least excessive, were always a function of the trailer sales price, and were not documented by the kind of records that the Internal Revenue Service would require to establish that the charges for the services were properly excludable from the price upon which the excise tax was computed.

The approval of the supplemental charge plan by the attorney Cushwa and the accountant Engel was conditioned on the value of the services in a specific case equalling or exceeding the amounts charged and on the keeping of records that would demonstrate that the distributor actually received the services for which it was charged. When this conditional approval was given, the charges were represented to be $34 per unit for national advertising and $70 per unit for management consulting fees.

The supplemental charge plan that was first put into operation did not really incorporate the procedures that counsel advised to be necessary to avoid problems with the Internal Revenue Service. Distributors were charged the amounts approved by counsel, and the supplemental charges were posted on the corporate books in a proper fashion. Supplemental charges for advertising and management consulting fees were posted to expense accounts, and supplemental interest charges were posted to an interest income account. However, the supplemental charges were from the beginning a function of the sales price and not of services rendered. The "Distributor Analysis of Price Adjustment" work sheets and the method of computing the charges for advertising and management consulting fees (subtracting the interest charge from the increase in discount to distributors given along with the implementation of the supplemental charge plan and al-

locating the remainder between the two charges) insured that the supplemental billings would not be based on the value of services performed but on the sales price. Distributors were thus unable to avoid the supplemental charges, regardless of whether services were performed, when they purchased trailers. If distributors returned trailers, the bililngs would be cancelled proportionately; if distributors did not purchase trailers, no supplemental billings were issued. Of course, because the supplemental billings were a function of the sales price, they would increase corresponding to the increases in the list price of the trailers.

Within a short period of time after the institution of the supplemental charge plan, the charges did in fact increase. In June, 1957, the distributor Motor Truck Equipment Company was charged $147.34 per unit for national advertising. In November, 1957, the distributor Berman Sales Company was charged $124.91 per unit for advertising.

As a result of these increases in the supplemental charges, the credits for the charges on appellant Fruehauf's books were distorting the budgets of appellant Fruehauf's departments. Of course, it would be impossible for appellant Fruehauf's method of accounting to distort the budgets if there were in fact expenses matching the amounts charged to distributors in the supplemental billings. In August, 1957, the postings to expense and interest income accounts were reversed, and thereafter the supplemental charges were posted as adjustments to the price of new trailers. In effect, the supplemental charges were treated as part of the trailer costs. This accounting treatment was inconsistent with the original theory of the supplemental billings, that distributors were billed for services not related to trailer production.

This change in the accounting treatment of supplemental billings indicated that the supplemental charge plan was operating in an unjustifiable manner. So did the lack of record keeping. In the autumn of 1958, appellant Rowan was warned by co-conspirator Morris that sufficient records were not being kept, but appellant Rowan took no action to correct the situation. This situation prevailed throughout the life of the supplemental charge plan. In October, 1964, during the course of the Internal Revenue Service audit of Fruehauf's excise tax returns, co-conspirator Morris admitted to Revenue Agent Kiefer that there were no records to substantiate the supplemental charges as costs to be separated from the trailer expenses.

It is not clear, however, that any records could have justified the amounts charged in the supplemental billings. In July, 1958, an internal Fruehauf study demonstrated that the charges were far in excess of the amount discussed with the attorney Cushwa and the accountant Engel in December, 1956. The charges were not decreased but were instead increased, in November, 1959, from a total of 3.75% of the list price of the trailers to a total of 5%. The charges were continued at that percentage through 1964, by which time the supplemental charges were way out of line with the original amounts approved by Cushwa and Engel and were unrelated to the value of whatever services were being performed. In September, 1964, the distributor Hobbs Trailer Company was charged over $366 per unit for printed matter and over $733 per unit for management consulting fees. In October, 1964, charges to Hobbs were $473 per unit for printed matter and $946 for management consulting fees.

The fact that the supplemental charges had grown to excessive amounts and had little, if any, relationship to the value of services rendered to distributors was further

demonstrated by the manner in which the supplemental billings were manipulated. In December, 1958, Regulations 330 were published. Regulation 330.1-1(b) provided that charges for advertising could not be excluded from the excise tax base, reversing the policy that the Internal Revenue Service had been following in previous years when issuing private letter rulings. Appellant Fruehauf's reaction to this regulation, which would disallow its exclusion of national advertising from the taxable price of trailers, was to change the billing designation of advertising to printed matter. According to co-conspirator Morris, the change was made without any new study being made to determine whether there was enough printed matter furnished to Fruehauf distributors to justify the charge. Of course, the charge for printed matter was a continuation of the charge for national advertising.

The Indiana gross income tax and Southern Railway transactions were even more blatant manipulations of the supplemental billing system. The Indiana gross income tax incident occurred in the autumn of 1958, when the Internal Revenue Service was auditing appellant Fruehauf's excise tax returns. During the course of the audit, the examining agent found that appellant Fruehauf had been improperly excluding from the excise tax base a tax on gross income levied by the State of Indiana, which was included in the price of trailers sold to certain wholesale distributors. Appellant Fruehauf proposed a compromise whereby the Internal Revenue Service would not assert a tax deficiency if appellant Fruehauf would refund to distributors the amounts collected as Indiana gross income tax, and the Internal Revenue Service agreed to the proposal. The three affected distributors, Warner-Fruehauf, Berman Sales, and Motor Truck Equipment, were issued

credit memoranda in the amounts collected as Indiana gross income tax. In the next month's supplemental billings, however, the same amounts were added to that month's regular billings. Thus, the amounts credited to the distributors' accounts under the compromise with the Internal Revenue Service were recouped through the supplemental billings. In this case, the supplemental billing system provided the mechanism by which appellant Fruehauf could renege on its agreement with the Internal Revenue Service.

The Southern Railway incident occurred in 1964. The distributor Warner-Fruehauf purchased from appellant Fruehauf a number of trailers which were in turn leased to Southern Railway. The sale of the trailers was accompanied by the regular monthly supplemental charges. At the request of Warner-Fruehauf, however, credit memoranda were issued by Fruehauf cancelling the regular supplemental charges in connection with the Southern Railway trailers and new charge invoices were prepared and submitted in the identical amounts, only describing the purported services as special engineering research, stress analysis, and design cost, performed from January 1, 1964, through June 30, 1964. No records were maintained to substantiate that these services were rendered.

Finally, there was the 1965 revision of the supplemental charge plan. Co-conspirator Morris, worried about the Internal Revenue Service excise tax audit, authored a memorandum in December, 1964, to appellant Rowan, recommending that appellant Fruehauf consider revising its method of computing the manufacturers excise tax because of the dubious validity of the exclusion of the supplemental charges from the price upon which the excise tax was computed. Appellant Fruehauf did revise its

supplemental charge plan but not in a way that would bring the plan into accord with the law. Instead, the supplemental charges were maintained under the new designations "finance" and "teletype" in replacement of the charges for "printed matter" and "management consulting." These supplemental charges, although under new designations, continued to be posted to the Fruehauf books as adjustment to the price of new trailers and to be a function of the list price of trailers. The teletype charge was for running Fruehauf's teletype system, over and above the rental fee already charged, and the finance charge was for operating Fruehauf's own finance company. Of course, the charges for teletype and finance as instituted in the supplemental charge plan were for costs of appellant Fruehauf doing business, the selling of trailers, and were not excludable from the price upon which the excise tax was computed. In addition, the 1965 revision dramatized how different the actual supplemental charge plan was from that proposed to Cushwa and Engel in December, 1956.

In light of this evidence, the district judge correctly found that the supplemental charges of advertising, printed matter, management consulting fees, teletype, and finance were required to be included in the price upon which the excise tax was computed; in reality, the supplemental charges constituted a portion of appellant Fruehauf's real price for the trailers. Co-conspirator Morris and appellant Rowan admitted as much. In September, 1964, Morris told Revenue Agent Kiefer that the denomination of the billings to distributors made no difference to appellant Fruehauf. In recorded testimony taken in 1967 by the Internal Revenue Service, appellant Rowan admitted that the costs of rendering services to appellant Fruehauf's distributors constituted an unsegregated portion of the costs of operating several of Fruehauf's de-

partments and were considered by appellant Fruehauf in developing its selling prices and profit margins. In short, there was no basis for separating out the costs of the services billed in the supplemental charge plan for the costs of producing the trailers. The true price of trailers covered the costs billed for separately in the supplemental charge plan; the price upon which the excise tax was to be computed could not therefore exclude those costs.

4. The Exclusion of Handling, Installation, Make-Ready, and Delivery Charges.

Appellants contend that charges for installation, make-ready, delivery, and handling services are excludable from the excise tax base pursuant to § 4216(a). Appellee United States replies that not all such charges billed as handling or make-ready are excludable, arguing that many of these charges are charges incident to placing the article in condition, packed ready for shipment, and hence includable in the taxable price under § 4216(a) and *Fitch*. Appellee United States cites *Lionberger* v. *United States*, 371 F.2d 831, 842 (Ct. Cl.), *cert. denied*, 389 U.S. 844 (1967), in which it was held that a trailer manufacturer's charges, such as "hitching the trailers, connecting tail lights, inspection, minor repair, washing, wheel greasing * * * tire care and replacement" were outside the intended scope of the exclusions enumerated in § 4216(a).

Appellee United States presents the better legal analysis. The Revenue Rulings, private letter rulings, and Technical Advice Memoranda issued by the Internal Revenue Service in this area and relied upon by appellants as supporting their position have permitted the exclusion of handling, installation, make-ready, and delivery charges after shipment to a particular customer begins, a position consistent with *Fitch*.

There is, however, a question of when such shipment begins. Appellants suggest it is at the inspection area of the manufacturing plant, but that can hardly be true in every case. That there is a question, though, does explain the district judge's treatment of appellant Fruehauf's adoption of the Hobbs method of including a handling charge in the price to retail customers but excluding that amount from the list price for the calculation of the excise tax base, an action that was questionable in view of the fact that the Fruehauf handling charge was not like the Hobbs handling charge and the fact that the Internal Revenue Service had advised that the Fruehauf handling charge was not excludable. The Fruehauf handling charge was in fact more a standard charge for putting the trailers into perfect condition ready for shipment than the Hobbs charge, which varied from sale to sale depending on the services performed. The district judge noted that the Internal Revenue Service did not approve the exclusion and that appellant Fruehauf kept a double set of invoices with respect to trailers sold to distributors in order to hide the exclusion from the Internal Revenue Service, but did not explicitly find that the exclusion was improper.

By contrast, the district judge did find that the $50 per unit make-ready allowance to distributors, which was recognized in the supplemental charges from January 1, 1962, through December, 1964, was a fictitious item, established for the sole purpose of evading excise tax due with respect to trailers sold by appellant Fruehauf, and the district court had ample evidence on which to base that finding. Regardless of any technical questions with respect to handling charges, such a fictional charge cannot be justified. The institution of that charge was further proof that appellants engaged in the conspiracy charged in the indictment.

5. The Exclusion of the Warranty Allowance.

Effective September 1, 1961, the increase in distributor discount included the warranty allowance that had previously been stated on the invoices separately; by this change, appellant Fruehauf excluded the warranty allowance from the excise tax base for all sales. Appellants contend that the district judge erroneously found that the warranty allowance extended to distributors was not excludable from the taxable price of the trailer.[30] Appellee United States replies that under the authority of *Chrysler Corp.* v. *United States,* 300 F.2d 154 (6th Cir. 1962), aff'g 190 F. Supp. 412 (E.D. Mich. 1960), appellant Fruehauf's warranty allowance was not a permissible exclusion from the excise tax base.

The *Chrysler Corp.* case does state the relevant law in this Circuit. In *Chrysler Corp.,* the manufacturer hired its distributors to satisfy the manufacturer's warranty obligations to ultimate customers. Warranty expenses were held not to constitute price readjustments under § 6416 of the Internal Revenue Code of 1954, 26 U.S.C. § 6416, because the sales price was for an article free of defects and the warranty expenses were thus spent for correcting defects so that the manufacturer's part of the bargain to

[30] Appellants contend that the warranty allowance question was not properly in the case because it was not included in the indictment. While it is true that the warranty issue is not specifically addressed in the indictment, the indictment does refer to the arbitrary, false reduction of the wholesale price by appellants, an allegation that would include this warranty allowance question. Furthermore, our review of appellants' Motion for a Bill of Particulars and the Government's Response does not reveal to us that the Government failed to disclose the question or that the question was removed from the case by any Governmental response.

deliver a sound article would be satisfied. *See General Motors Corp., Frigidaire Div.* v. *United States,* 147 F. Supp. 739 (Ct. Cl. 1957).

In the present case, implicit in certain of the district judge's findings was the finding that distributors were given a warranty allowance in return for the distributors performing warranty services on appellant Fruehauf's behalf,[31] and thus under the *Chrysler Corp.* case the warranty allowance to appellant Fruehauf's distributors could not be excluded from the taxable price of the trailers.[32] Although appellants claim that the district judge based his finding that the warranty allowance was not excludable on the ground that appellant Fruehauf could not contract away any warranty obligations, it is clear that the evidence supported the implicitly stated finding that distributors performed warranty services on Fruehauf's behalf.

The Tire Tax Credits

Appellants contend that the practice of computing tire tax credits on the basis of invoice prices stated according to the OEM price lists, without reflecting any adjustment for pre-arranged rebates to Fruehauf was arguably proper and that appellants could not therefore be prosecuted for following such a procedure. Appellants seek support in the fact that the "purchase price" of the tires, upon which the tire tax credit is to be computed, is not defined in the

[31] District Court Findings 25, 31, and 126.

[32] The price readjustment provisions of 26 U.S.C. § 6416(b) and the definition of price provisions of 26 U.S.C. § 4216(a) are to be read *in pari materia. Waterman-Bic Pen Corp.* v. *United States,* 332 F.2d 711, 714 (2d Cir. 1964).

Internal Revenue Code. According to appellants, without such a statutory definition, their practice was not unreasonable.

We are not impressed with this argument. The incidence of federal taxation has always depended upon the substance of transactions, *Commissioner* v. *Court Holding Co.,* 324 U.S. 331, 334 (1945), *Owens* v. *Commissioner,* 568 F.2d 1233, (6th Cir. 1977), and in the present case, the purchase price was unquestionably the negotiated "confidential" price. The evidence clearly established that appellant Fruehauf negotiated prices with tire companies that were below the OEM prices, that appellant Fruehauf requested that it be billed for the tires according to the OEM price lists rather than according to the negotiated prices, and that Fruehauf received monthly rebates equal to the difference between the negotiated and OEM prices. To suggest that such a procedure could raise a question of law as to the "purchase price" of tires for the purpose of the manufacturers excise tax law is simply disingenuous, and it is not unfair to say that appellant Rowan and co-conspirator Morris were aware of the complete lack of justification for the procedure followed by appellant Fruehauf in claiming tire tax credits. In 1964, during the course of the Internal Revenue Service audit, both men feigned ignorance when questioned about the practice of computing tire tax credits on the basis of invoice prices without adjustments for pre-arranged rebates.

Nor does a 1925 Solicitor's Memorandum help appellants. S.M. 2706, IV-1 Cum. Bull. 315 (1925). In the situation treated by the Solicitor's Memorandum, rebates were given by the manufacturer to the purchaser, in accordance with trade practice, based upon a sharp post-sale decline

in the market price of tires. The amount of the rebate was not known at the time of the purchase. In fact, it was not known whether there would be a rebate at all. The Solicitor's Memorandum concluded that the original contract between the parties stated the "purchase price" and that the excise tax was to be computed on that price.

In contrast, the evidence in the present case showed that there was but one negotiated price, the "confidential" price. The rebate was in no way dependent upon subsequent events, but existed only because appellant Fruehauf had requested billing at the OEM price in order to compute tire tax credits on a higher price. That appellant Fruehauf could not legally follow such a practice can hardly be questioned. If appellant Fruehauf's practice could be instituted, then companies in appellant Fruehauf's position could wipe out its excise tax liability by simply negotiating prices for tires high enough to create enough tax credits, with the understanding that a fixed portion of the "price" would be returned by the tire companies in rebates.

IV

Appellants contend that their convictions cannot be affirmed because they relied in good faith upon the advice of counsel and hence a basic element of the offense was not proved. According to appellants, it is well settled that proof that one acted on the advice of counsel negates criminal intent if the legal advisor is competent, if full disclosure of all known pertinent facts is made to counsel, and if there is a good faith attempt to follow the advice given.

Appellee United States does not quarrel with appellants' statement of the general legal principle with respect to reliance on the advice of counsel. What the United States

does dispute is the assertion that appellants did in fact act in good faith reliance upon the advice of counsel.

We believe that the record clearly shows that appellants did not rely in good faith on the advice of counsel. Appellants did not follow the advice of the attorney Cushwa and the accountant Engel concerning the supplemental charge plan. Cushwa and Engel limited their approval of the plan on the conditions that appellant Fruehauf be able to demonstrate that a particular distributor actually received the service for which the distributor was charged, that the value of the services performed in a specific case equal or exceed the amount charged, and that records be maintained showing the services rendered for each distributor and for each of the categories of supplemental fees charged. Cushwa and Engel warned that a flat charge to a distributor for some service never rendered, even though billed separately, was part of the selling price of the trailer and would have to be included in the excise tax base. As Parts I and III of this opinion reveal, appellants did not heed this counsel and incorporate into the supplemental charge plan the procedures advised by counsel to be necessary to justify breaking out the supplemental charges from the price of the trailer. The plan that was instituted bore little resemblance to the plan to which counsel gave a conditional blessing. Instead, the supplemental billings operated as a function of the trailer price and thus fell within the scope of Cushwa's and Engel's warning concerning flat charges to distributors.

Nor did appellants rely in good faith on counsel's advice as to the computation of tire tax credits based on the invoiced OEM price without regard to pre-arranged rebates. At first, appellants did not even inform counsel. When co-

conspirator Morris and appellant Rowan discussed the tire tax credit in March, 1958, they did not seek the advice of counsel. Instead, automobile companies were called and asked how they computed tire tax credits. After counsel was informed in December, 1958, the attorney Cushwa advised appellant Fruehauf that its method of computing tire tax credits was highly questionable and that the company should recognize the potential liability.[33] As with the supplemental charge plan, appellants ignored Cushwa's advice until the 1964 Internal Revenue Service excise tax audit forced appellants to change this practice.

Finally, appellants were not always honest with their counsel. When appellants sought counsel's approval of the exclusion of a handling charge made to retail customers in April, 1959, appellant Rowan and co-conspirator Morris falsely represented to Cushwa that the Fruehauf handling charge was the same as the installation charge of Hobbs Trailer Company. In October, 1961, shortly after the institution of the September, 1961, increase in discount to distributors, co-conspirator Morris told Cushwa that there was no allowance to distributors for warranty expense, even though the warranty allowance was in fact concealed in the increase in discount.

V

Appellants contend that the indictment in the present case was time-barred. According to appellants, the conspiracy to aid or assist in the preparation and presentation of materially false and fraudulent excise tax returns in violation of 26 U.S.C. § 7206(2) was subject to the three-

[33] Government Exhibits 83, 103, and 104.

year limitation period of 26 U.S.C. § 6531,[34] and the con-

[34] 26 U.S.C. § 6531 provides in pertinent part:

> No person shall be prosecuted, tried, or punished for any of the various offenses arising under the internal revenue laws unless the indictment is found or the information instituted within 3 years next after the commission of the offense, except that the period of limitation shall be 6 years—
>
> (1) for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner;
>
> (2) for the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof;
>
> (3) for the offense of willfully aiding or assisting in, or procuring, counseling, or advising, the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a false or fraudulent return, affidavit, claim, or document (whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document);
>
> (4) for the offense of wilfully failing to pay any tax, or make any return (other than a return required under authority of part III of subchapter A of chapter 61) at the time or times required by law or regulations;
>
> (5) for offenses described in sections 7206(1) and 7207 (relating to false statements and fraudulent documents);
>
> (6) for the offense described in section 7212(a) (relating to intimidation of officers and employees of the United States);
>
> (7) for offenses described in section 7214(a) committed by officers and employees of the United States; and
>
> (8) for offenses arising under section 371 of Title 18 of the United States Code, where the object of the conspiracy is to attempt in any manner to evade or defeat any tax or the payment thereof.

spiracy to defraud the United States was subject to the general five-year statute, 18 U.S.C. § 3282.[35]

Appellants' argument is without merit. The applicable statute of limitations to the conspiracy to attempt to evade or defeat the payment of taxes in violation of 26 U.S.C. § 7201 is the six-year period stated for 26 U.S.C. § 6531(8), *Braverman* v. *United States,* 317 U.S. 49, 55 (1942), and as to that portion of the indictment, there was no bar.

A conspiracy to defraud the United States is also subject to the six-year period of 26 U.S.C. § 6531 because of the plain meaning of the terms of subsection (1) of that statute, *United States* v. *Lowder,* 492 F.2d 953 (4th Cir.), *cert. denied,* 419 U.S. 1092 (1974), but even under the five-year statute that appellants would apply, the charge was not time-barred. The last overt act alleged in the indictment was the filing of the manufacturers excise tax return for the final calendar quarter of 1965, which occurred February 8, 1966. The present indictment was returned November 9, 1970, less than five years after the last overt act in the indictment.

A conspiracy to violate 26 U.S.C. § 7206(2) is subject either to the six-year period of § 6531 or to the general five-year statute, 18 U.S.C. § 3282. As was stated in *Braverman* v. *United States, supra,* 317 U.S. at 54, "A conspiracy is not the commission of the crime which it contemplates, and neither violates nor 'arises under' the statute whose violation is its object." The three-year period stated in

[35] 18 U.S.C. § 3282 provides:

> Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

§ 6531 covers offenses that arise under the revenue laws, excepting those enumerated as falling within the six-year period. Thus, the three-year portion of the statute cannot apply to conspiracy cases such as this one. The six-year period, however, is not by its terms strictly limited to offenses that arise under the revenue laws. Subsections (1) and (8) apply the six-year period of limitations to conspiracies to defraud the United States and to evade taxes. In the present case, those subsections determine the limitations period for the portions of the indictment alleging the conspiracy to defraud the United States and to evade taxes. Subsection (3) of § 6531 covers the substantive offense of violating 26 U.S.C. § 7206(2) but does not expressly cover the conspiracy to violate § 7206(2); however, it would be sensible to interpret § 6531 to extend subsection (3) to cover the conspiracy offense as well. But if § 6531 (3) does not cover a conspiracy to violate § 7206(2), the general five-year statute does. In either event, the conspiracy to violate § 7206(2) was not time-barred.

VI

Appellants contend that their convictions must be vacated for errors of pleading and proof: (1) the indictment failed to allege willfulness as to the object offenses of the conspiracy and (2) the proof failed to show that a tax was due and owing. Appellee United States replies that appellants are improperly trying to treat the charged conspiracy as substantive revenue offenses and denies that there were any errors of pleading and proof in this conspiracy prosecution.

We agree with the United States. Appellants' contentions here are at odds with the principle that the crime of conspiracy to commit an offense is an entirely separate

crime from the commission of the object offense itself. *Pinkerton* v. *United States,* 328 U.S. 640, 643 (1946); *United States* v. *Rabinowich,* 238 U.S. 78, 86 (1915).

In *Wong Tai* v. *United States,* 273 U.S. 77, 81 (1927), the Supreme Court treated the question of what precision in pleading object offenses was required in a conspiracy indictment.

> It is well settled that in an indictment for conspiring to commit an offense—in which the conspiracy is the gist of the crime—it is not necessary to allege with technical precision all the elements essential to the commission of the offense which is the object of the conspiracy, *Williamson* v. *United States,* 207 U.S. 425, 447, or to state such object with the detail which would be required in an indictment for committing the substantive offense, *Thornton* v. *United States,* 271 U.S. 414, 423; *Jelke* v. *United States* (C.C.A.), 255 Fed. 264, 275; *Anderson* v. *United States* (C.C.A.), 260 Fed. 557, 558; *Wolf* v. *United States* (C.C.A.), 283 Fed. 885, 886; *Goldberg* v. *United States* (C.C.A.), 277 Fed. 211, 213. In charging such a conspiracy "certainly to a common intent, sufficient to identify the offense which the defendants conspired to commit, is all that is necessary." *Williamson* v. *United States, supra,* 447; *Goldberg* v. *United States, supra,* 213.

See United States v. *Branan,* 457 F.2d 1062, 1063-65 (6th Cir. 1972); *United States* v. *Mixon,* 374 F.2d 20, 22 (6th Cir. 1967); *Davis* v. *United States,* 253 F.2d 24, 25 (6th Cir. 1958). The indictment in the present case identified the object offenses, referring appellants to the specific statutory sections involved, and for the purpose of an indictment charging a conspiracy offense, that was sufficient. *Davis* v. *United States, supra,* 253 F.2d at 25. Moreover, the indictment in the present case charged that appellants "then and there well knew" that Fruehauf's excise tax

liability was understated, which is a statement that appellants did have a willful state of mind with respect to the tax evasion and false returns object offenses of the conspiracy.[36] In *Wong Tai,* the Supreme Court upheld an indictment that used the term "well knowing" in connection with the object offense of the conspiracy.

As for the alleged failure to prove that a tax was due and owing, the short answer to appellants' contention is that such proof was not necessary. The gist of the crime of conspiracy is the agreement to commit an illegal act, not the accomplishment of the illegal act. *United States* v. *Rabinowich, supra,* 238 U.S. at 87-89.

Contrary to appellants' statements, the Supreme Court cases of *Sansone* v. *United States,* 380 U.S. 343 (1965),

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[36] The "overt acts" section of the indictment makes this allegation.

OVERT ACTS

THE GRAND JURY FURTHER CHARGES:

That on or about 30 days after the close of each quarter year shown in Column 1 below, at the office of the District Director of Internal Revenue for the Internal Revenue District of Michigan, in Detroit, Michigan, and in furtherance of, in the execution of and for the purpose of carrying into effect the object, design and purpose of the conspiracy, the defendant FRUEHAUF CORPORATION by and through its officers: defendants GRACE and ROWAN, and co-conspirator Morris, and other corporate employees and agents unknown to the Grand Jury, filed quarterly Manufacturer's Excise Tax Returns (IRS form 720) purporting to show an Excise Tax liability of defendant FRUEHAUF CORPORATION (Column 2), when in fact the defendants GRACE and ROWAN and co-conspirator Morris then and there well knew that the purported Excise Tax liability was substantially understated (Column 3), and that the true and correct Excise Tax liability for each quarter year was that shown in Column 4; the conspiracy being a violation of Section 371, Title 18, United States Code.

Lawn v. *United States,* 355 U.S. 339 (1959), and *Spies* v. *United States,* 317 U.S. 492 (1943), do not stand for the proposition that there can be no conspiracy to attempt to evade a tax that is not due and owing. The *Sansone* and *Spies* decisions are strictly substantive tax evasion cases that do not even discuss the question of conspiracy. The *Lawn* decision, when treating the conspiracy aspect of the case, does not require the showing of a tax deficiency.

Nor are *Ingram* v. *United States,* 360 U.S. 672 (1959), and *United States* v. *Andrews,* 347 F.2d 207 (6th Cir.), *cert. denied,* 382 U.S. 956 (1965), of any assistance to appellants' case.[37] In *Ingram* v. *United States, supra,* the Supreme Court held that in a gambling tax conspiracy case, the defendants had to know they were liable for federal taxes by reason of the gambling operations. In *United States* v. *Andrews, supra,* this Court stated that "convictions for conspiracy to evade federal gambling tax laws cannot be sustained absent proof 1) that defendants were parties to an agreement to defeat or evade the taxes, *or* 2) that defendants had knowledge that the taxes were due and were not being paid, plus conduct in furtherance of a plan to evade them" (emphasis supplied).

Even if it were necessary in this conspiracy case for the United States to plead and prove that taxes were due and owing (and it is not), the Government carried that burden. The indictment charged and the district judge found that appellant Fruehauf had substantially understated its excise tax liability in its returns during the period of the conspiracy as a result of the supplemental charge plan and excessive tire tax credits. The district judge also found that there were taxes owing for each of the last five calendar quarters listed in the indictment, the last quarter of 1964 and the four quarters of 1965. Appellants' contention that against these deficiencies they are entitled to set off certain overpayments, resulting from the tax paid on nontaxable refrigeration units, in order to defeat criminal liability is ridiculous.

[37] Appellants also cite *United States* v. *DeNiro,* 392 F.2d 753 (6th Cir.), *cert. denied,* 393 U.S. 826 (1968), but that case only in passing discusses the need for knowledge of tax liability to sustain a tax conspiracy conviction and is no support for the broad propositions of law that appellants press to this Court.

VII

Appellants raise a number of arguments in support of their contention that they were denied a fair trial. None of the arguments, however, have any merit. The district judge did not engage in any improper ex parte communications with Government counsel or witnesses. The district judge did not err in refusing to grant an evidentiary hearing concerning the grand jury's possible knowledge of Regulations 316 and 330. Appellants' claims concerning the "Surrey letter" are frivolous. The findings of fact entered by the district judge fully complied with the requirements of Rule 23(c) of the Federal Rules of Criminal Procedure. *See B. F. Goodrich Co.* v. *Rubber Latex Products, Inc.,* 400 F.2d 401, 402 (6th Cir. 1968); *Deal* v. *Cincinnati Board of Education,* 369 F.2d 55, 63-64 (6th Cir. 1966), *cert. denied,* 387 U.S. 847 (1967); *United States* v. *Peterson,* 338 F.2d 595, 598 (7th Cir. 1964), *cert. denied,* 380 U.S. 911 (1965). Finally, the district judge did not err in his rulings on the admissibility of evidence.

The judgments of conviction are affirmed.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

• • (Caption — No. 45320) • •

118 MEMORANDUM AND ORDER
(Feb. 19, 1975)

By motion filed April 4, 1974, defendants herein moved to dismiss the Indictment in the instant proceeding on the ground that the applicable statute of limitations had expired prior to Indictment.

The instant Indictment, consisting of a single count, charges that the named defendants, together with two alleged co-conspirators, not named as defendants, wilfully and unlawfully conspired, in violation of Section 371, Title 18, United States Code, to:

(1) Defraud the United States by impeding, impairing and obstructing the lawful governmental functions of the Internal Revenue Service of the Treasury Department of the United States in the ascertainment, computation, assessment and collection of $12,344,587.31 in federal manufacturer's excise taxes;

(2) Attempt to evade or defeat (contrary to Section 7201, Title 26, United States Code), the payment of $12,344,587.31 in federal excise taxes to be due and owing and due and owing to the United States by the Fruehauf Corporation for the periods October 1, 1956, through December 31, 1965;

(3) Aid or assist in, and procure, counsel and advise the preparation and presentation (in violation of Section 7206(2), Title 26, United States Code), of materially false and fraudulent excise tax returns for the defendant, Fruehauf Corporation, for all calendar quarters beginning October 1, 1956, and ending December 31, 1965, the returns understating the amount of excise taxes payable by Fruehauf Corporation totaling $12,344,587.31.

Defendants' Motion To Dismiss was based on the threshold contention that the statute of limitations applicable to the instant proceeding is 18 U.S.C. 3282, which provides a five-year statute of limitations for non-capital offenses arising under Title 18, United States Code, including 18 U.S.C. 371. However, the instant Indictment, which was returned November 9, 1970, alleges on its face at least one overt act falling within the five-year period espoused by the defendants, being the Federal Manufacturer's Excise Tax Return filed on behalf of defendant Fruehauf Corporation for the calendar quarter ending December 31, 1965. Our ruling on Defendants' Motion was held in abeyance pending the Government's direct presentation of evidence at trial, inasmuch as the allegations contained in the Indictment satisfied even the five-year limitation imposed by 18 U.S.C. 3282.

The statute of limitations governing the instant proceeding is not the general five-year statute provided by 18 U.S.C. 3282, as contended by the defendants, but rather 26 U.S.C. 6531, which provides a six-year statute of limitations for various offenses arising under Internal Revenue laws. Specifically, 26 U.S.C. 6531 provides a six-year statute of limitations:

Section 6531. Periods of Limitation on Criminal Prosecutions.

• • •

(1) For offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner;

• • •

(8) For offenses arising under Section 371 of Title 18 of the United States Code, where the object of the conspiracy is to attempt in any manner to evade or defeat any tax or the payment thereof.

In *Braverman* v. *United States*, 317 U.S. 49 (1942), the Supreme Court had occasion to construe the predecessor Section of 26 U.S.C. 6531(8). After considering the legislative history and purpose of that Section, the Court held

> • • • It is enough that the conspiracy involves an attempt to evade or defeat the payment of federal taxes, which was among the objects of the conspiracy of which petitioner was convicted. Enlargement, to six years, of the time for prosecution of such conspiracies was the expressed purpose of the amendment [adding the provision now embodied as 26 U.S.C. 6531(8).] • • •

This order is entered upon defendants' request for a ruling on their Motion to Dismiss its Indictment upon the close of the Government's case-in-chief. Indulging in all inferences favorable to the Government as, at this point in time, we must, *United States* v. *May*, 430 F. 2d 715 (C.A. 6, 1970); *United States* v. *Craven*, 478 F. 2d 1329 (C.A. 6, 1973), we find that the government has established the existence of a conspiracy in violation of 18 U.S.C. 371; that

among the objects at which said conspiracy was directed was the attempt to evade or defeat the payment of Federal Manufacturer's Excise Taxes, contrary to 26 U.S.C. 7201; and that the Government has established the commission of the following overt acts in furtherance of said conspiracy, alleged in the Indictment and within the applicable statute of limitations, all being the filing of false Federal Manufacturer's Excise Tax Returns on behalf of the defendant Fruehauf Corporation, as indicated below:

Quarterly Period Ended	Date Filed
December 31, 1964	February 9, 1965
March 31, 1965	May 10, 1965
June 30, 1965	August 10, 1965
September 30, 1965	November 10, 1965
December 31, 1965	February 8, 1966

Accordingly, Defendant's Motion to Dismiss Indictment because of the running of the statute of limitations is denied.

/s/ *Thomas P. Thornton*
Thomas P. Thornton
United States District Judge

DATED: February 19, 1975
A TRUE COPY
Henry R. Hanssen, Clerk
By: *Kathleen Gruber*
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

• • (Caption — No. 45325) • •

201 MEMORANDUM AND ORDER
DENYING MOTION FOR NEW TRIAL
(June 10, 1976)

The defendants move the Court under Rule 33 of the Federal Rules of Criminal Procedure to set aside the verdicts rendered herein, to vacate the judgments entered herein and grant the defendants a new trial on the following grounds:

1. The Court erred in denying the defendants' Motion for Judgment of Acquittal at the conclusion of the evidence.

2. The verdicts are unsupported by the evidence as a matter of law.

3. The verdicts are unsupported by the evidence as a matter of fact.

4. The verdicts are contrary to the evidence.

5. The verdicts are contrary to law.

6. The Court erred in admitting documents into evidence over the objection of the defendants.

The said Motion for New Trial is supported by allegations that concern a denial by the Court of motions by the defendants for discovery and inspection and for disclosure of exculpatory information.

With respect to the foregoing defendants claim that a letter, dated September 13, 1961, from Stanley S. Surrey,

Assistant Secretary of the Treasury to the Honorable Wilbur D. Mills, Chairman, Committee on Ways and Means of the House of Representatives, contains information which the defendants now represent to be newly discovered evidence, as indicated by the following taken from defendants' Memorandum in Support of Motion for New Trial, submitted November 3, 1975, at page 15:

II. THE COURT ERRED IN DENYING DEFENDANTS' SUPPLEMENTAL DISCOVERY MOTIONS

• • •

This motion was again denied, and the defendants were forced to cross-examine the government's expert witness without the benefits of such discovery. If such discovery had been granted by the Court, defendants would have been provided with a letter dated September 13, 1961, from Stanley S. Surrey, Assistant Secretary of the Treasury to the Honorable Wilbur D. Mills, Chairman, Committee on Ways and Means of the House of Representatives. This letter was obtained by the defendants as a result of the Freedom of Information Act request made on the Treasury Department following trial on July 29, 1975, and is attached hereto as Exhibit "B". Mr. Surrey's letter provides in pertinent part:

> One of the long-standing problems under the manufacturers excise taxes was whether certain advertising expenses incurred by the distributor or retailer for which reimbursement was provided by the manufacturer should be included in the taxable price. This problem was highlighted in 1958 when the Treasury Department published Treasury Decision 6340. This regulation in-

terpreted then existing law as requiring inclusion in taxable price of any charge which a manufacturer required to be paid as a condition to his sale of a taxable article, provided the charge was not attributable to an expense falling within one of the exclusions provided for by law.

* * *

The Treasury position in this area was reversed in 1960 by Public Law 86-781 . . .

This letter shows a recognition by the Department of the Treasury that its regulations under Section 3441 of the 1939 Internal Revenue Code announced in T.D. 6340 had been repealed by Congressional legislation. This view was formally announced by the Treasury Department in T.D. 6635, which repealed the regulations promulgated by T.D. 6340, by publication in the Federal Register on February 7, 1963. See Exhibit "A". It was prejudicial error to deny defendants access to this letter and other requested documents for use in cross-examining Revenue Agent Kiefer. Had defendants been aware of the revocation of T.D. 6340, they would have cross-examined Mr. Kiefer concerning his reliance on it. That such cross-examination would have been conducted is clear since Mr. Kiefer, in his revenue agent's report, which was furnished to defendants, stated:

Except as modified by Section 4216(f) effective 1/1/61, which allows a limited exclusion for certain local advertising charges, Section 330-1(b) Excise Tax Regulations (1954) (temporary) provides that any charge required by a manufacturer to be paid as a condition to his sale and which is not attributable to a charge covered in Section

4216(a), is includable in the sale price upon which the tax is based, (unless it can be shown, as stated in Section 316.12, Excise Tax Regulations 40, that the charge "is not to be included as a manufacturing or selling expense, or is no way incidental to placing the article in condition packed ready for shipment"). It is, therefore, concluded that the supplemental charges are properly includable in the sale price of the trailers upon which the tax is based. They are charges which are required by the Corporation to be paid as a condition of sale and they are not attributable to an expense following [sic (falling)] within one of the exclusions provided in Section 4216(a) of the Code. P. 13.

Clearly, Mr. Kiefer was relying heavily upon T.D. 6340 and was apparently not aware that it had been totally revoked. This discovery would have permitted defendants a much more searching cross-examination of Mr. Kiefer for his erroneous reliance upon T.D. 6340 and its effect on his computations of alleged deficiencies shown by GX 241, 242 and 243.

What the defendants were able to develop as to the repeal of T.D. 6340 after the decision of the U.S. Court of Appeals for the Sixth Circuit on June 9, 1975, is an example of the prejudice and not the exclusive reason why they have been denied a fair trial by the Court's failure to grant their discovery motions. Such development by the defendants is illustrative of the importance to the defendants of being granted the discovery which was requested prior to trial and during trial. The defendants discovered the repeal of the regulations promulgated by T.D. 6340 as a result of their being able to obtain by alternate methods docu-

ments which were in the files of the Treasury Department. With the letter of Mr. Surrey (Exhibit "B") having been furnished, the defendants were led to make a detailed study of the promulgation of subsequent regulations which resulted in the discovery that the regulations promulgated by T.D. 6340 were repealed as of January 1, 1961.

III. NEWLY DISCOVERED EVIDENCE REQUIRES A NEW TRIAL

On June 9, 1975, subsequent to the trial of the instant case, the Court of Appeals for the Sixth Circuit affirmed the order of this Court in the related case of *Fruehauf* v. *Internal Revenue Service,* No. 4-70345. On July 29, 1975, the defendants herein made demand on the United States Department of the Treasury for certain documents that had been previously denied to them. One of the documents furnished by the Treasury Department is a letter, dated September 13, 1961 from Stanley S. Surrey, Assistant Secretary of the Treasury, to the Honorable Wilbur D. Mills, Chairman, Committee on Ways and Means, House of Representatives. A copy is attached hereto as Exhibit "B". As has been shown more fully above in Section II, this letter was an acknowledgment that the regulations promulgated by T.D. 6340 had been "reversed in 1960 by Public Law 86-781."

As shown by Exhibit "A", the last sentence of Regulations §48.0-4, promulgated by T.D. 6635 as published in the Federal Register stated:

> The regulations in this part supersede the regulations in Part 330 (26 C.F.R. (1939) Part 330) in respect of sales made on or after January 1, 1961. Page 1201, Federal Register, February 7, 1963.

When this same regulation was subsequently republished in the Code of Federal Regulations, the above statement was erroneously omitted as shown by Exhibit "C" attached hereto.

The Government's Response to Motion for New Trial, submitted November 13, 1975, sets forth the following:

> A review of the history and development of Section 4216 of the Internal Revenue Code reflects that the Regulations promulgated in T.D. 6340 were an Administrative recognition of the Supreme Court decision in *F. W. Fitch Company* v. *United States,* 323 U.S. 582 (1945).
>
> Section 4216(a) of the Internal Revenue Code provides, in pertinent part, that:
>
> > (a) Containers, Packing and Transportation Charges—In determining * * * the price for which an article is sold, there shall be included any charge for coverings and containers of whatever nature, and any charge incident to placing the article in condition packed ready for shipment, but there shall be excluded the amount of tax imposed by this chapter, whether or not stated as a separate charge. A transportation, delivery, insurance, installation, or other charge (not required by the foregoing sentence to be included) shall be excluded from the price only if the amount thereof is established to the satisfaction of the Secretary or his delegate in accordance with the Regulations.

Provisions similar to Section 4216(a) were contained in Section 3441 of the 1939 Internal Revenue Code, which in turn was derived from Section 619(a) of the 1932 Code.

In *F. W. Fitch Company* v. *United States, supra,* the Supreme Court interpreted Section 619(a) of the 1932 Code. There, the petitioner contended that its advertising and selling expenses fell within the term "other charge" appearing in the last sentence of Section 619(a) (now Section 4216(a)) and, hence, were excludible in determining the selling price for tax purposes. The Court denied the claim, however, stating that it was refuted "both by the spirit and the letter" of the statutory provision. The Court reasoned:

> . . . In essence, all manufacturing and other charges incurred prior to the actual shipment of an article and reflected separately or otherwise in the f.o.b. wholesale price are to be included in the sale price underlying the tax, while all charges incurred subsequent thereto are to be excluded. Hence, any additional charge which a purchaser would not be required to pay if he accepted delivery of the article at the factory or place of production may be so excluded. (Citations omitted.)
>
> Advertising and selling expenses incurred by manufacturers such as petitioner clearly fall within the class of charges which Congress intended to be included in the tax base. Regardless of whether we consider such expenses technically as manufacturing costs, it is obvious that they are incurred prior to the actual shipment of articles to wholesale purchasers, and that they enter into the

> composition of the wholesale selling price. Even if the purchaser accepts delivery at the factory, he pays for the advertising and selling expenses. Thus, they must be included in the taxable sales price.

However, until 1958 the Internal Revenue Service continued to follow its published rulings in S.T. 430, C.B. II-2, 300 (1923), and S.T. 523, C.B. XI-2, 477 (1932). Those rulings, to the extent that they sanctioned exclusion of cooperative local advertising charges, were inconsistent with the Supreme Court decision in *Fitch.*

In a reversal of this erroneous position and in accordance with the Supreme Court's decision in *Fitch,* the Treasury issued new regulations in 1958 defining the term "price" for purposes of manufacturers' excise taxes. Regulation 26, Section 330.1-1(b) (referred to at trial as "good ole T.D. 6340") provides that:

> Any charge which is required by a manufacturer, producer, or importer to be paid as a condition to his sale of a taxable article and which is not attributable to an expense falling within one of the exclusions provided in Section 3441(a) of the Internal Revenue Code of 1939 is includable in the sale price upon which the tax is paid. It is immaterial for this purpose that the charge may be paid to someone other than the manufacturer, producer, or importer, or that it may be billed separately to the purchaser as one earmarked for expenses incurred or to be incurred in his behalf, as for example, for advertising at the national or local level, for demonstration or display of the article, for sales promotion programs, or otherwise.

In T.D. 6340 the Internal Revenue Service also expressly revoked its Published Rulings S.T. 430 and S.T. 523.

In 1960, Congress enacted Section 4216(f) of the Internal Revenue Code. It provides for a limited exclusion of "local advertising" charges from the price of a taxable article. The definition of local advertising and the limits of excludibility are precisely defined by the statute. Section 4216(f)(3) specifically provides that:

> Except to the extent provided by paragraph (1) and (2), *no charge or expenditure for advertising shall serve* * * * *as the basis for an exclusion from* * * * *the price of any article.* (Emphasis supplied.)

To give effect to this legislative modification of the Supreme Court decision in *Fitch,* and in recognition of the new stautory provision, the Treasury published new Regulations in the Federal Register on February 7, 1963. These are the Regulations which supersede T.D. 6340.

To the extent that T.D. 6340 reflects the Treasury interpretation of law prior to the enactment of Section 4216(f), it is correct; and it is entitled to great weight in a Court of law. *Economy Savings & Loan Co.* v. *Commissioner,* 158 F.2d 472 (C.A. 6, 1946).

To the extent that Congress changed the law in 1960, of course, T.D. 6340 was superseded. However, the Congressional enactment of Section 4216(f) does not change the law applicable to this case, since the Defendants never had a "local advertising" charge.

In this regard, the Court's Findings of Fact reflect that the supplemental charge plan proposed to Mr.

Cushwa on December 13, 1956, included a proposed exclusion for *national* advertising (Findings of Fact Nos. 12-17). This advertising charge was thereafter implemented by Messrs. Rowan and Morris effective October 1, 1956 (Findings of Fact Nos. 32-34). The procedure of billing the distributors an advertising charge continued thereafter until January 1959, when, in response to the publication of T.D. 6340, the co-conspirators changed the name of the charge from "advertising" of "printed matter, catalogues, etc." (Findings of Fact Nos. 54 and 55).

Thus, the publication of T.D. 6340 and the Court's Findings of Fact relative thereto are highly relevant to the issue of wilfulness, since they show an arbitrary modification of the supplemental charge plan to conceal the true nature of a charge to the distributors. The Court's Finding relative to the taxability of the Advertising-Printed Matter charge is also correct:

> 134. The supplemental charge for printed matter, catalogues, etc., which commenced January 1959, was a continuation of the purported charge for *national* advertising, which charge, regardless of its designation, was required to be included in the "price" of trailer. (Emphasis supplied.)

The Defendants have not asserted and there is *no* evidence to establish that the "printed matter, catalogues, etc." charge which was in effect from January 1959 to December 1964, complied with the provisions of Section 4216(f). Without such proof, there is no reason to grant a new trial, since absolutely nothing would be accomplished thereby.

To the extent that Defendants, by relying upon the change in Regulations, seek to avoid the "condition

of sale" language contained in T.D. 6340, the effort is to no avail; this term simply paraphrases the terminology and reasoning of the Supreme Court in *Fitch, supra,* to the effect that "price" includes all charges which the purchaser cannot avoid, "(r)egardless of whether we consider such expenses technically as manunfacturing costs"; and *Fitch,* of course, has been neither reversed nor modified by the change in Regulations relied upon by Defendants.

Nowhere in the Indictment filed in this cause is there any mention of T.D. 6340 (which is here as Government's Exhibit 89). In the Findings of Fact returned by the Court GX 89-2 is mentioned in relation to Finding of Fact No. 54, which is as follows:

> On December 16, 1958 the Internal Revenue Service published regulations in the Federal Register stating that
>
> > Any charge which is required by a manufacturer, producer, or importer to be paid as a condition of sale of a taxable article and which is not attributable to an expense falling within one of the exclusions provided in Section 3441(a), is includible in the sale price upon which the tax is based. It is immaterial for this purpose that the charge may be paid to someone other than the manufacturer, producers, or importer, or that it may be separately billed to the purchaser as one earmarked for expenses incurred or to be incurred in his behalf, as for example, for advertising at the national or local level, for a demonstration or display of the article, for a sales promotion program, or otherwise (GX 89-2).

Finding of Fact No. 55 is related to Finding of Fact No. 54, as follows:

> As a result of the above regulation (Tr., V. 5, pp. 591-592), Fruehauf changed the billing designation in its supplemental charges from "advertising" to "printed matter, catalogs, etc." and such charge was continued thereafter through the month of December 1964 (GX 22; GX 90-95).

At a hearing on certain post-trial motions heard by the Court on November 17, 1975, Mr. Barnett, as counsel for the defendants, made mention of newly discovered evidence in relation to T.D. 6340 (GX 89) and stated, in part, as follows: (Tr. 34)

> MR. BARNETT: Well, we say that the Prosecutor actively argued a reversed regulation, and found that the proof in the trial on that reversed Regulation, Your Honor, and had we been aware at the time of the trial, it could have materially altered our preparation for trial, it could have materially altered the matter [sic] in which we conducted the trial and probably materially have altered the manner in which the Government conducted the trial, Your Honor.

The Court answered the foregoing conjectural statements as follows:

> THE COURT: Well, that seems rather a strong complaint coming from an attorney that headed up a defense that had about seven or eight attorneys, four or five of whom have been previously with the Bureau of Internal Revenue, and if the Government didn't know about the reversal, what about the legal talent that represented the Defendants that's in here, complaining about the case [sic] [regulation] being beversed.

In addition to trial counsel, there was also associated with defendants' excise tax matters defendant Mr. Rowan, who was and is a Certified Public Accountant, Mr. Morris, head of the Fruehauf Corporation tax department, who was and is an accountant, and a locally prominent Detroit accounting firm on retainer by the Fruehauf Corporation. The testimony is replete with discussions on excise tax matters between defendant Rowan and co-conspirator Morris, as representatives of Fruehauf Corporation, and Raymond C. Cushwa,* of the Washington law firm of Davies, Richberger, Tydings and Randau and, in addition, present at least at some of the discussions was W. K. Engel of the accounting firm of Touche, Niven, Bailey and Smart.

The Indictment is in one count and charges, in part, as follows:

> That on or about October 1, 1956, the exact date being unknown to the Grand Jury, and continuously thereafter up to and including February 8, 1966, in the Eastern District of Michigan and in other judicial districts of the United States, the FRUEHAUF CORPORATION (known prior to May 2, 1963, as the Fruehauf Trailer Company), and WILLIAM E. GRACE and ROBERT ROWAN, defendants, and Robert M. Chawner (now deceased), and Kenneth A. Morris, co-conspirators but not defendants, wilfully and unlawfully conspired with each other, and with other persons unknown to the Grand Jury, to:
>
> (1) defraud the United States by impeding, impairing, obstructing and defeating the lawful governmental functions of the Internal Revenue Service

* Mr. Cushwa died before the commencement of this trial.

> (IRS) of the Treasury Department of the United States in the ascertainment, computation, assessment, and collection of $12,344,587.31 in Federal Manufacturer's Excise Taxes;
>
> (2) attempt to evade and defeat (contrary to Section 7201, Title 26, United States Code), the payment of $12,344,587.31 in Federal Excise Taxes to be due and owing and due and owing to the United States by the FRUEHAUF CORPORATION for the period October 1, 1956, through December 31, 1965;
>
> (3) aid or assist in, and procure, counsel and advise the preparation and presentation (in violation of Section 7296(2), Title 26, United States Code), of materially false and fraudulent Excise Tax Returns (IRS Form 720) for the defendant FRUEHAUF CORPORATION for all calendar quarter years beginning October 1, 1956, and ending December 31, 1965, the returns understanding the amount of Excise Tax payable by FRUEHAUF CORPORATION totaling $12,344,-587.31.

A reading of the foregoing excerpt from the Indictment would put the defendants and their counsel on notice that the defendants were charged with a conspiracy to defraud the United States by impeding, impairing, obstructing and defeating the lawful governmental function of the Internal Revenue Service (IRS) of the Treasury Department of the United States in the ascertainment, computation, assessment and collection of $12,344,587.31 in Federal Manufacturer's Excise Taxes. It is absolutely unrealistic to the Court that the array of highly competent defense counsel, with extensive backgrounds in the field of tax law would neglect to research the regulations of the Bureau of In-

ternal Revenue in relation to the payment of excise taxes, at least during the period of time covered by the Indictment. When we add to that the availability to the defense of equally competent CPA's and accounting firms and, in addition, tax counsel in the person of Mr. Cushwa based in Washington, it is difficult for the Court to assume that any regulation pertaining to excise taxes—whether presently in effect or modified, during the period of the conspiracy could be classified as newly discovered evidence.

In paragraph II, at p. 16, of defendants' Memorandum in Support of Motion for New Trial, submitted November 3, 1975, entitled, "THE COURT ERRED IN DENYING DEFENDANTS' SUPPLEMENTAL DISCOVERY MOTIONS," it is stated, in part, as follows:

> Had defendants been aware of the revocation of T.D. 6340, they would have cross-examined Mr. Kiefer concerning his reliance on it. That such cross-examination would have been conducted is clear since Mr. Kiefer, in his revenue agent's report, which was furnished to defendants*, stated:
>
> > Except as modified by Section 4216(f) effective 1/1/61, which allows a limited exclusion for certain local advertising charges, * * *.

The foregoing establishes to the satisfaction of the Court that defense counsel in this matter knew, or should have known, of a change in T.D. 6340 before the trial was started. This fact supports the Court's conclusion that there is no merit to defendants' claim of newly discovered evidence.

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* As of May 20, 1976, Agent A. Kiefer informed the Court, upon inquiry, that his report was made available to defense counsel before the commencement of the trial of this case.

The same determination is made by the Court in relation to the letter dated September 13, 1961 from Stanley S. Surrey, Assistant Secretary of the Treasury to the Honorable Wilbur E. Mills, Chairman of the Ways and Means Committee of the House of Representatives, since this letter, according to their claim, led defense counsel to information about a change in T.D. 6340 that had already been made available to them by Mr. Kiefer's report.

The defendants further allege, in support of their Motion for New Trial that "THE COURT ERRED IN DENYING DEFENDANTS' SUPPLEMENTAL DISCOVERY MOTIONS" and seem to rely principally on the Surrey letter which has been previously disposed of in this memorandum. When the Supreme Court of the United States determined that the Freedom of Information Act was not available for criminal discovery the Court, with the cooperation of the Government, continued the opportunity for discovery under the criminal discovery rule, and it is the recollection of the Court, without reviewing the transcript, that a substantial volume of records from the Bureau of Internal Revenue was made available to defense counsel.

The defense further alleges that the Court's denial of defendants' Motion for Disclosure of Exculpatory Information was in error and precluded a fair trial, and again the defense seems to rely upon the fact that T.D. 6340 had been changed and that the Surrey letter had been fraudulently withheld from them by the prosecution. The matter of the Surrey letter has been previously disposed of in this memorandum.

Paragraph IV of the defendants' Memorandum in Support of Motion for New Trial alleges a failure by the Court to comply with Rule 23(c) of the Federal Rules of Criminal

Procedure and bases the said complaint upon the following (at page 24):

> Although there is no legal authority for the prosecution requesting special findings of fact, the procedure adopted by the Court in the case at bar was to adopt proposed findings submitted by the prosecution, while not answering a large number of requests made by the defendants. The prosecutor submitted 150 proposed findings of fact. The Court adopted 124 of these verbatim. The Court failed to answer 142 of the requests for special findings submitted by defendants.

The defendants offered no sworn testimony by witnesses by way of defense to the charges in the Indictment, which is their right. However, since the proofs offered by the Government in support of the charges in the Indictment were taken from the files and records of the defendant Fruehauf Corporation, as indicated by the Findings of the Court, it is difficult for the Court to ascertain how findings can be made in a criminal case in behalf of a defendant who has presented no defense by way of evidence countervailing that of the government.

> Defendant is sometimes faced with "a hard choice" in deciding whether to rest on his motion for acquittal at the close of the government's case, or to go forward with proof and thus lose the opportunity to obtain special findings which might disclose that the judge applied the wrong standard in ruling on the motion. He cannot obtain special findings at the close of the government's case, but only at the close of all the evidence. (8 Moore's Federal Practice, ¶23.05, p. 23-14, Criminal Rules (2d ed. 1969).)

When both sides rested the Court requested Government counsel to submit findings of fact for the consideration

of the Court and to correlate each proposed finding with the transcript and/or the exhibits. Upon receipt of the said proposed findings the Court and the Law Clark spent two weeks, with the daily interruptions that are associated with the office, in checking each reference of each finding with the transcript. In addition, Mr. Al Biernat of the Intelligence Unit of the local Bureau of Internal Revenue withdrew from the files each exhibit mentioned in the finding and the part of the transcript and the part of the exhibit that identified the finding was read by the Court. On page 10 of defendants' Additional Memorandum in Support of Defendants' Motion for New Trial there is found the following: "It appears from the findings of this Court tht it adopted these contentions of the prosecutor." This statement by defendants is incorrect. What the Court did was accept the evidence that supported the contentions of the prosecutor in relation to the findings that had been proposed by Government counsel.

As previously indicated the Indictment alleges, in part, that the defendants and co-conspirators attempted to evade and defeat the payment of a stated amount in federal excise taxes contrary to Section 7201, Title 26 of the United States Code, Title 26 U.S.C., §7201 reads, in part as follows:

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, • • •

The Indictment further alleges that the defendants and co-conspirators did aid and assist in, and procure, counsel, and advise the preparation and presentation of materially false and fraudulent excise tax returns for the defendant Fruehauf Corporation, in violation of §7206(2), Title 26

U.S.C. Title 26, U.S.C., §7206, subparagraph (2) reads, in part, as follows:

> [any person who—]
>
> Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document; * * *

The four essential elements that are required to be proved in order to establish the offense of conspiracy under the provisions of Section 371, Title 18, U.S.C. and charged in this Indictment, are as follows:

> First: That the conspiracy described in the Indictment was wilfully formed, and was existing at or about the time alleged;
>
> Second: That the defendants wilfully became members of the conspiracy;
>
> Third: That one of the conspirators thereafter knowingly committed at least one of the overt acts charged in the Indictment, at or about the time and place alleged; and
>
> Fourth: That such overt act was knowingly done in furtherance of some object or purpose of the conspiracy, as charged.

If the trier of the facts finds beyond a reasonable doubt from the evidence of the case that the existence of the conspiracy charged in the Indictment has been proved, and

that during the existence of the conspiracy one of the overt acts alleged was knowingly done by one of the conspirators in furtherance of some object or purpose of the conspiracy, then proof of the conspiracy charge is complete; and it is complete as to every person found by the jury to have been wilfully a member of the conspiracy at the time the overt act was committed regardless of which of the co-conspirators committed the overt act.

The Government presented an abundance of evidence from the books and records of the Fruehauf Corporation that established that the corporation, the defendants and the co-conspirators had by a concert of action, and wilfully, devised a plan to illegally avoid the payment of excise taxes in the manufacture of trailers by surreptitiously employing a device described as supplemental billings, which contained charges that should have been included in the tax base, and by computing the excise taxes on tires by using the O.E.M.* price as a tax base when the defendants and co-conspirators knew of the confidential price arrangement (in existence between Fruehauf Corporation and the tire manufacturer) pursuant to which there would be a rebate by the tire manufacturer to Fruehauf on the tires purchased by Fruehauf.

To act or participate wilfully means to act or participate voluntarily and intentionally, and with specific intent to do something the law forbids, or with specific intent to fail to do something the law requires to be done; that is to say, to act or participate with the bad purpose either to disobey or to disregard the law. So, if a defendant, or any other person, with understanding of the unlawful character of a plan, knowingly encourages, advises or assists,

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* O.E.M. means Original Equipment Manufacture.

for the purpose of furthering the undertaking or scheme, he thereby becomes a wilful participant—a conspirator.

The evidence presented by the Government that established the existence of a device known as supplemental billings to avoid the payment of excise taxes and the use of the O.E.M. price as a tax base for the purchase of its tires when the defendants well knew that there would be a rebate paid to Fruehauf, has been accepted to support finding No. 141, which is as follows:

> 141. The defendants and co-conspirators in a concert of action, evaded a substantial part of Fruehauf Corporation's excise tax liability by instituting and utilizing deceptive invoicing procedures to (1) reduce Fruehauf Corporation's wholesale excise tax base, and (2) increase its tire tax credits.
>
> The defendants Grace and Rowan, together with the co-conspirators Morris and Chawner, with full knowledge of the deceptive invoicing procedures, willfully and unlawfully participated in the plan to evade a substantial part of Fruehauf Corporation's excise tax liability by employing the deceptive invoicing procedures. By jointly engaging in these practices the defendants Grace and Rowan and the co-conspirators, but not defendants, Morris and Chawner, willfully and unlawfully conspired to:
>
> (1) defraud the United States by impeding, impairing, obstructing and defeating the lawful governmental functions of the Internal Revenue Service (IRS) of the Treasury Department of the United States in the ascertainment, computation, assessment, and collection of federal manufacturers' excise taxes;

> (2) attempt to evade and defeat (contrary to Section 7201, Title 26, United States Code), the payment of federal excise taxes to be due and owing and due and owing to the United States by the Fruehauf Corporation for the period October 1, 1956 through December 31, 1965;
>
> (3) aid or assist in, and procure, counsel and advise the preparation and presentation (in violation of Section 7206(2), Title 26, United States Code), of materially false and fraudulent Excise Tax Returns (IRS Form 720) for the defendant Fruehauf Corporation for all calendar quarter years beginning October 1, 1955, and ending December 31, 1965.

On page 4 of the Transcript of November 17, 1975 (Docket entry No. 147) the Court stated as follows:

> THE COURT: Well, in the light of the findings that have been made by the Court, I don't expect that you are going to find anything in the Bureau of Internal Revenue that is going to have any impact on those findings.

It is still the position of the Court that irrespective of the defendants' allegations of newly discovered evidence, exculpatory evidence, and/or the Surrey letter, they are not going to obtain any letter ruling, regulation or proclamation issued by the Bureau of Internal Revenue that puts the stamp of approval on a conspiracy to defraud the United States by impeding, impairing, obstructing and defeating the lawful function of the Internal Revenue Service in its duties in relation to the federal manufacturer's excise taxes.

In *Ashe* v. *United States*, 288 F.2d 725, 733 (6th Cir. 1961) Judge O'Sullivan, in discussing a motion for a new trial had the following to say:

> The disposition of a motion for new trial upon newly discovered evidence rests in the sound discretion of the trial judge. * * * [Citations omitted.] Among other criteria ordinarily required for the granting of a new trial for newly discovered evidence, are that the new evidence must not be merely cumulative and that it be such that on a new trial such evidence would probably produce an acquittal. * * * [Citations omitted.]

In light of the Government's evidence that supports the findings, there is nothing in the rather extensive allegations of the defendants' Motion for New Trial that would probably produce an acquittal.

The defendants also move for an evidentiary hearing, supported by the following Memorandum, submitted December 1, 1975:

> Defendants were provided with a copy of the report of the Internal Revenue Service Special Agent at trial in the instant case. This report has a section, commencing on page 30 thereof, entitled, "APPLICABLE LAW." On page 32, as part of this section, the following appears:
>
> > Regulations Subsection 330.1-1 (Exhibit 10-B), "Determination of price for purposes of manufacturers excise taxes.—(a) Section 3441(a) of the Internal Revenue Code of 1939, provides the following rules for determining the price at which an article is sold for the purposes of computing any manufacturers excise tax imposed by Chapter 29 of such Code, which is based on the price for which the article is sold, is set forth as follows:
> >
> > "Sales Price.—
> >
> > • • •

> > (b) "Any charge which is required by a manufacturer, producer, or importer to be paid as a condition to his sale of a taxable article and which is not attributable to an expense falling within one of the exclusions provided in Section 3441(a) of the Internal Revenue Code of 1939 is includable in the sale price upon which the tax is based . . ."

These regulations were repealed and inapplicable to any sales made on or about January 1, 1961. As shown by the affidavit of Ernest L. Rushmer attached hereto, the assistant United States attorney in charge of this case stated that the Special Agent's report was read to the grand jury. This constitutes a reasonable ground for an evidentiary hearing to determine whether the instant indictment was in fact based upon a repealed Treasury Regulation. In such case the grand jury would have abdicated its function just as though the indictment had been returned with no evidence to support it.

Judge Learned Hand stated in U.S. v. Costello, 221 F.2d 668, 677 (2nd Cir. 1955), aff'd. 350 U.S. 359:

> "* * * We should be the first to agree that, if it appeared that no evidence had been offered that rationally established *the facts,* the indictment ought to be quashed; because then the grand jury would have in substance abdicated." [Emphasis supplied.]

Defendants are entitled to an evidentiary hearing to determine if the indictment in this cause was based in material part on the "Applicable Law" provision of the Special Agent's report which is, in effect, no law.

The Indictment in this matter was returned on November 9, 1970 and the motion for an evidentiary hearing was filed on December 1, 1975. A presumption of regularity attaches to a grand jury's proceedings. It has already been established in this memorandum of the Court that defense counsel had a copy of Special Agent Kiefer's report prior to the commencement of the trial. As already indicated, the defendants allege in their motion for an evidentiary hearing that "the Special Agent's report was read to the grand jury." With knowledge of the fact that the Special Agent read his report to the grand jury, and after filing a mountain of pretrial motions, and participating in 50 trial days, defendants filed a motion, December 1, 1975, for an evidentiary hearing for the purpose of inquiring as to the validity of the indictment returned in this cause. The Court has been advised that there was not a court reporter's transcript of the grand jury proceedings. In addition, Special Agent Kiefer was on the witness stand for 17 days* during the course of this trial, and if he spent 1/34th of that time as a witness before the grand jury, it would seem to the Court that it has the right to draw the inference that Kiefer's testimony before the grand jury included something in addition to reading Exhibit 10(b), as described in defendants' motion for an evidentiary hearing. It is highly probable that he gave abundant testimony and that it "rationally established the facts" referred to in Judge Hand's opinion in the Costello case.

Supplementing the fact that the Motion for an Evidentiary Hearing comes too late, according to Rule 12, *Truchinski* v. *United States,* 393 F.2d 627, 633 (8th Cir. 1968) is authority for the following:

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* As reflected in the Deputy Clerk's court day book.

> As noted in United States v. Tane, at pp. 853-854 of 329 F.2d, "As long as there is some competent evidence to sustain the charge issued by the Grand Jury, an indictment should not be dismissed." • • •

Section (b)(2) of Rule 12 of the Federal Rules of Criminal Procedure reads, in part, as follows:

> (b) *Pretrial Motions.* Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. The following must be raised prior to trial:
>
> • • •
>
> (2) Defenses and objections based on defects in the indictment or information (other than that it fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceedings); • • •

The motion to hold an evidentiary hearing is denied.

In addition to the foregoing motions the defendants have filed a Motion for Acquittal and a Motion in Arrest of Judgment, and with respect to their disposition the following is interesting (pages 6 and 7 of the Transcript of November 17, 1975, Docket entry No. 147):

> MR. BARNETT: Well, let me—I think I should ease your mind with respect to two of the motions, the motion for acquittal, Your Honor, and the motion in arrest. We feel that those motions have in essence been argued at least three times during the course of the trial.

The motion for acquittal, of course, was argued at the close of the Government's case, and it was in effect reargued at the close of all the evidence in the final arguments.

If we have not persuaded you with those arguments, we don't feel that at this juncture we are likely to persuade you further with respect to that on oral argument, and for that reason, Your Honor, I am content to stand on our written brief with respect to that, and with the motion in arrest, there is one added quality wtih respect to that motion in arrest.

As Your Honor recognizes, the motion in arrest is an after trial motion in the same nature as our motion to dismiss, attacking the indictment and it is predicated in large measure upon the statute of limitations argument.

The court is *forced* to agree with Mr. Barnett that these two motions have been argued and determined by the Court and if, as stated by Mr. Barnett in relation to his motion in arrest of judgment, there are new matters for the consideration of the Court, the said matters have already been determined in this memorandum. So, accordingly, the Motion for Acquittal and the Motion in Arrest of Judgment are denied.

The Motion for New Trial is denied.

/s/ *Thomas P. Thornton*
Thomas P. Thornton
United States District Judge

Dated: June 10, 1976

A TRUE COPY

Henry R. Hanssen, Clerk

By ....., Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 76-2313

Filed May 5, 1978

JOHN P. HEHMAN, Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

FRUEHAUF CORPORATION, WILLIAM E. GRACE and ROBERT ROWAN,

Defendants-Appellants.

Before: WEICK, PECK and LIVELY, Circuit Judges.

JUDGMENT

APPEAL from the United States District Court for the Eastern District of Michigan.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Michigan, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs taxed.

ENTERED BY ORDER OF THE COURT.

/s/ *John P. Hehman*
Clerk

No. 76-2313

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Filed June 6, 1978

JOHN P. HEHMAN, Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

FRUEHAUF CORPORATION, WILLIAM E. GRACE and ROBERT ROWAN,

Defendants-Appellants.

Before: WEICK, PECK and LIVELY, Circuit Judges.

ORDER

Defendants-appellants' petition for rehearing having come on to be considered and of the judges of this Court who are in regular active service less than a majority having favored ordering consideration en banc, the petition has been referred to the panel which heard the appeal, and it further appearing that the petition for rehearing is without merit,

IT IS ORDERED that the petition be, and it hereby is denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
John P. Hehman, Clerk of Court

STATUTES INVOLVED

18 U.S.C.—CRIMES AND CRIMINAL PROCEDURE

§ 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

• • •

§ 3282. Offenses not capital

Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

INTERNAL REVENUE CODE, 26 U.S.C.

As originally enacted, August 16, 1954, except as otherwise indicated

§ 4061. Imposition of tax

(a) Automobiles.—There is hereby imposed upon the following articles (including in each case parts or accessories therefor sold on or in connection therewith or with

the sale thereof) sold by the manufacturer, producer, or importer a tax equivalent to the specified percent of the price for which so sold:

(1) Articles taxable at 8 percent, except that on and after April 1, 1955, the rate shall be 5 percent—

Automobile truck chassis.
Automobile truck bodies.
Automobile bus chassis.
Automobile bus bodies.
Truck and bus trailer and semitrailer chassis.
Truck and bus trailer and semitrailer bodies.
Tractors of the kind chiefly used for highway transportation in combination with a trailer or semitrailer.

A sale of an automobile truck, bus, truck or bus trailer or semitrailer shall, for the purposes of this paragraph, be considered to be a sale of the chassis and of the body.

(2) Articles taxable at 10 percent except that on and after April 1, 1955, the rate shall be 7 percent—

Automobile chassis and bodies other than those taxable under paragraph (1).

Chassis and bodies for trailers and semitrailers (other than house trailers) suitable for use in connection with passenger automobiles.

Motorcycles.

A sale of an automobile, trailer, or semitrailer shall, for the purposes of this paragraph, be considered to be a sale of the chassis and of the body.

(b) Parts and accessories.—There is hereby imposed upon parts or accessories (other than tires and inner tubes and other than automobile radio and television receiving sets) for any of the articles enumerated in subsection (a) sold by the manufacturer, producer, or importer a tax equivalent to 8 percent of the price for which so sold, except that on and after April 1, 1955, the rate shall be 5 percent.

• • •

§ 4216. Definition of price

(a) Containers, packing and transportation charges.—In determining, for the purposes of this chapter, the price for which an article is sold, there shall be included any charge for coverings and containers of whatever nature, and any charge incident to placing the article in condition packed ready for shipment, but there shall be excluded the amount of tax imposed by this chapter, whether or not stated as a separate charge. A transportation, delivery, insurance, installation, or other charge (not required by the foregoing sentence to be included) shall be excluded from the price only if the amount thereof is established to the satisfaction of the Secretary or his delegate in accordance with the regulations.

(b) Constructive sale price.—If an article is—

(1) sold at retail,

(2) sold on consignment, or

(3) sold (otherwise than through an arm's' length transaction) at less than the fair market price,

the tax under this chapter shall (if based on the price for which the article is sold) be computed on the price for which such articles are sold, in the ordinary course of trade, by manufacturers or producers thereof, as determined by the Secretary or his delegate.

(c) Partial payments.—In the case of—

(1) a lease,

(2) a contract for the sale of an article wherein it is provided that the price shall be paid by installments and title to the article sold does not pass until a future date notwithstanding partial payment by installments,

(3) a conditional sale, or

(4) a chattel mortgage arrangement wherein it is provided that the sales price shall be paid in installments,

there shall be paid upon each payment with respect to the article that portion of the total tax which is proportionate to the portion of the total amount to be paid represented by such payment.

§ 4216(b)(1), as amended, P.L. 85-589, 115, effective January 1, 1959

(b) Constructive Sale Price—

"(1) In general.—If an article is—

"(A) sold at retail,

"(B) sold on consignment, or

"(C) sold (otherwise than through an arm's length transaction) at less than the fair market price,

the tax under this chapter shall (if based on the price for which the article is sold) be computed on the price for which such articles are sold, in the ordinary course of trade, by manufacturers or producers thereof, as determined by the Secretary or his delegate. In the case of an article sold at retail, the computation under the preceding sentence shall be on whichever of the following prices is the lower: (i) the price for which such article is sold, or (ii) the highest price for which such articles are sold to wholesale distributors, in the ordinary course of trade, by manufacturers or producers thereof, as determined by the Secretary or his delegate. This paragraph shall not apply if paragraph (2) applies.

• • •

§4216(f), as added by P.L. 86-781, effective January 1, 1961

(f) Exclusion of Local Advertising Charge From Sale Price.—

"(1) Exclusion.—In determining, for purposes of this chapter, the price for which an article is sold, there shall be excluded a charge for local advertising (as defined in paragraph (4)) to the extent that such charge—

"(A) does not exceed 5 percent of the price for which the article is sold (as determined under this section by excluding any charge for local advertising),

"(B) is a separate charge made when the article is sold, and

"(C) is intended to be refunded to the purchaser or any subsequent vendee in reimbursement of costs incurred for local advertising.

In the case of any such charge (or portion thereof) which is not so refunded before the first day of the fifth calendar month following the calendar year during which the article was sold, the exclusion provided by the preceding sentence shall cease to apply as of such first day.

"(2) Aggregate amount which may be excluded.—In the case of articles upon the sale of which tax was imposed under the same section of this chapter—

"(A) The sum of (i) the aggregate of the charges for local advertising excluded under paragraph (1), plus (ii) the aggregate of the readjustments for local advertising under section 6416(b)(1) (relating to credits or refunds for price readjustments), shall not exceed

"(B) 5 percent of the aggregate of the prices (determined under this section by excluding all charges for local advertising) at which such articles were sold in sales on which tax was imposed by such section of this chapter.

The preceding sentence shall be applied to each manufacturer, producer, and importer as of the close of each calen-

dar quarter, taking into account the items specified in subparagraphs (A) and (B) for such calendar quarter and preceding calendar quarters in the same calendar year.

"(3) No adjustment for other advertising charges.—Except to the extent provided by paragraphs (1) and (2), no charge or expenditure for advertising shall serve, for purposes of this section or section 6416(b)(1), as the basis for an exclusion from, or as a readjustment of, the price of any article.

"(4) Local advertising defined.—For purposes of this section and section 6416(b)(1), the term 'local advertising' means only advertising which—

"(A) is initiated or obtained by the purchaser or any subsequent vendee,

"(B) names the article for which the price is determinable under this section and states the location at which such article may be purchased at retail, and

"(C) is broadcast over a radio station or television station or appears in a newspaper."

• • •

§ 4216(f), as amended by P.L. 87-770, §2(a), effective for articles sold on or after the first day of the first calendar quarter beginning more than 20 days after October 9, 1962

(f) Exclusion of local advertising charge from sale price.—

(1) Exclusion.—In determining, for purposes of this chapter, the price for which an article is sold, there shall be excluded a charge for local advertising (as defined in paragraph (4)) to the extent that such charge—

(A) does not exceed 5 percent of the price for which the article is sold (as determined under this section by excluding any charge for local advertising),

(B) is a separate charge made when the article is sold, and

(C) is intended to be refunded to the purchaser or any subsequent vendee in reimbursement of costs incurred for local advertising.

In the case of any such charge (or portion thereof) which is not so refunded before the first day of the fifth calendar month following the calendar year during which the article was sold, the exclusion provided by the preceding sentence shall cease to apply as of such first day.

(2) Aggregate amount which may be excluded.—In the case of articles upon the sale of which tax was imposed under the same section of this chapter—

(A) the sum of (i) the aggregate of the charges for local advertising excluded under paragraph (1), plus (ii) the aggregate of the readjustments for local advertising under section 6416(b)(1) (relating to credits or refunds for price readjustments), shall not exceed

(B) 5 percent of the aggregate of the prices (determined under this section by excluding all charges for local advertising) at which such articles were sold in sales on which tax was imposed by such section of this chapter.

The preceding sentence shall be applied to each manufacturer, producer, and importer as of the close of each calendar quarter, taking into account the items specified in subparagraphs (A) and (B) for such calendar quarter and preceding calendar quarters in the same calendar year.

(3) No adjustment for other advertising charges.—Except to the extent provided by paragraphs (1) and (2), no charge or expenditure for advertising shall serve, for purposes of this section or section 6416(b)(1), as the basis for an exclusion from, or as a readjustment of, the price of any article.

(4) Local advertising defined.—For purposes of this section and section 6416(b)(1), the term "local advertising" means only advertising which—

(A) is initiated or obtained by the purchaser or any subsequent vendee,

(B) names the article for which the price is determinable under this section and states the location at which such article may be purchased at retail, and

(C) is broadcast over a radio station or television station, appears in a newspaper or magazine, or is displayed by means of an outdoor advertising sign or poster.

(g) Certain trucks incorporating used components.—For purposes of the tax imposed by section 4061(a)(1) (relating to trucks, buses, etc.), in determining the price for which an article is sold, the value of any component of such article shall be excluded from the price, if—

(1) such component is furnished by the first user of such article, and

(2) such component has been used prior to such furnishing.

• • •

§ 6416. Certain taxes on sales and services

• • •

(c) Credit for tax paid on tires, inner tubes, radios or television receiving sets.—If tires, inner tubes, or automobile radio or television receiving sets on which tax has been

imposed under chapter 32 are sold on or in connection with, or with the sale of, an article taxable under section 4061(a) (relating to automobiles, trucks, etc.), there shall (under regulations prescribed by the Secretary or his delegate) be credited, without interest, against the tax under section 4061 an amount equal to, in the case of an article taxable under paragraph (1) or (2) of subsection (a) of section 4061, the applicable percentage rate of tax provided in such subsections—

(1) Of the purchase price (less, in the case of tires, the part of such price attributable to the metal rim or rim base) if such tires or inner tubes were taxable under section 4071 (relating to tax on tires and inner tubes) or, in the case of automobile radio or television receiving sets, if such sets were taxable under section 4141; or

(2) If such tires, inner tubes, or automobile radio or television receiving sets were taxable under section 4218 (relating to use by manufacturer, producer, or importer), then of the price (less, in the case of tires, the part of such price attributable to the metal rim or rim base) at which such or similar tires, inner tubes, or sets are sold, in the ordinary course of trade, by manufacturers, producers, or importers thereof, as determined by the Secretary or his delegate.

§ 6416(c), as amended by P.L. 85-859, § 163(a), effective January 1, 1959

(c) Credit for Tax Paid on Tires, Inner Tubes, or Radio or Television Receiving Sets.—If tires, inner tubes, or automobile radio or television receiving sets on which tax has been paid under chapter 32 are sold on or in connection with, or with the sale of, another article taxable under chapter 32, there shall (under

regulations prescribed by the Secretary or his delegate) be credited (without interest) against the tax imposed on the sale of such other article, an amount determined by multiplying the applicable percentage rate of tax for such other article by—

"(1) the purchase price (less, in the case of tires, the part of such price attributable to the metal rim or rim base) if such tires or inner tubes were taxable under section 4071 (relating to tax on tires and inner tubes) or, in the case of automobile radio or television receiving sets, if such sets were taxable under section 4141; or

"(2) if such tires, inner tubes, or automobile radio or television receiving sets were taxable under section 4218 (relating to use by manufacturer, producer, or impoter), the price (less, in the case of tires, the part of such price attributable to the metal rim or rim base) at which such or similar tires, inner tubes, or sets are sold, in the ordinary course of trade, by manufacturers, producers, or importers thereof, as determined by the Secretary or his delegate.

The credit provided by this subsection shall be allowable only in respect of the first sale on or in connection with or with the sale of, another article on the sale of which tax is imposed under chapter 32."

* * *

§ 6531. Periods of limitation on criminal prosecutions

No person shall be prosecuted, tried, or punished for any of the various offenses arising under the internal revenue laws unless the indictment is found or the information instituted within 3 years next after the commission of the offense, except that the period of limitation shall be 6 years—

(1) for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner;

(2) for the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof;

(3) for the offense of willfully aiding or assisting in, or procuring, counseling, or advising, the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a false or fraudulent return, affidavit, claim, or document (whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document);

(4) for the offense of willfully failing to pay any tax, or make any return (other than a return required under authority of part III of subchapter A of chapter 61) at the time or times required by law or regulations;

(5) for offenses described in sections 7206(1) and 7207 (relating to false statements and fraudulent documents);

(6) for the offense described in section 7212(a) (relating to intimidation of officers and employees of the United States);

(7) for offenses described in section 7214(a) committed by officers and employees of the United States; and

(8) for offenses arising under section 371 of Title 18 of the United States Code, where the object of the conspiracy is to attempt in any manner to evade or defeat any tax or the payment thereof.

The time during which the person committing any of the various offenses arising under the internal revenue laws is outside the United States or is a fugitive from justice within the meaning of section 3290 of Title 18 of the United States Code, shall not be taken as any part of the time limited by law for the commencement of such proceedings. (The preceding sentence shall also be deemed an amendment to section 3748(a) of the Internal Revenue Code of 1939, and shall apply in lieu of the sentence in section 3748(a) which relates to the time during which a person committing an offense is absent from the district wherein the same is committed, except that such amendment shall apply only if the period of limitations under section 3748 would, without the application of such amendment, expire more than 3 years after the date of enactment of this title, and except that such period shall not, with the application of this amendment, expire prior to the date which is 3 years after the date of enactment of this title.) Where a complaint is instituted before a commissioner of the United States within the period above limited, the time shall be extended until the date which is 9 months after the date of the making of the complaint before the commissioner of the United States. For the purpose of determining the periods of limitation on criminal prosecutions, the rules of section 6513 shall be applicable. Aug. 16, 1954, c. 736, 68A Stat. 815.

• • •

§ 7201. Attempt to evade or defeat tax

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution. Aug. 16, 1954, c. 736, 68A Stat. 851.

• • •

§ 7206. Fraud and false statements

Any person who—

(1) Declaration under penalties of perjury.—Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or

(2) Aid or assistance.—Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document; or

(3) Fraudulent bonds, permits, and entries.—Simulates or falsely or fraudulently executes or signs any bond, permit, entry, or other document required by the provisions of the internal revenue laws, or by any regulation made in pursuance thereof, or procures the same to be falsely or fraudulently executed, or advises, aids in, or connives at such execution thereof; or

(4) Removal or concealment with intent to defraud.—Removes, deposits, or conceals, or is concerned in removing, depositing, or concealing, any goods or commodities for or in respect whereof any tax is or shall be imposed, or any property upon which levy is authorized by section 6331, with intent to evade or defeat the assessment or collection of any tax impoed by this title; or

(5) Compromises and closing agreements.—In connection with any compromise under section 7122, or offer of such compromise, or in connection with any closing agree-

ment under section 7121, or offer to enter into any such agreement, willfully—

(A) Concealment of property.—Conceals from any officer or employee of the United States any property belonging to the estate of a taxpayer or other person liable in respect of the tax, or

(B) Withholding, falsifying, and destroying records.—Receives, withholds, destroys, mutilates, or falsifies any book, document, or record, or makes any false statement, relating to the estate or financial condition of the taxpayer or other person liable in respect of the tax;

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution. Aug. 16, 1954, c. 736, 68A Stat. 852.